[Cite as *Zupan v. P.C.S. Automotive, Inc.*, 2010-Ohio-3322.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94059

EDWARD ZUPAN

PLAINTIFF-APPELLEE

vs.

P.C.S. AUTOMOTIVE, INC.

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cleveland Municipal Court
Case No. 2009-CVI-000540

BEFORE: Dyke, P.J., Jones, J., and Cooney, J.

RELEASED: July 15, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

ANN DYKE, P.J.:

{¶ 1} This appeal is before the court on the accelerated docket pursuant to App.R. 11.1 and Loc.App.R. 11.1.

{¶ 2} Defendant-appellant, P.C.S. Automotive, Inc. ("appellant" or "PCS"), appeals from the Cleveland Municipal Court's order awarding plaintiff-appellee, Edward Zupan ("appellee"), $2,825.67 plus interest and costs for damage to appellee's vehicle. For the reasons set forth below, we affirm.

{¶ 3} On January 9, 2009, appellee filed a complaint alleging that PCS did not properly repair his vehicle, resulting in damage and additional expenses to his vehicle. Appellee sought relief in the amount of $3,000. On February 13, 2009, the magistrate conducted a hearing on the matter.

{¶ 4} Based on the evidence presented at the hearing,[1] the magistrate found that, on or about July 30, 2008, appellee took his 2003 Hyundai Sonata to PCS, an auto repair shop, to install an alternator for $303.25. Three weeks later, the vehicle's electrical power went out. In response, appellee purchased a battery from an auto parts store and returned the vehicle to PCS to install the new battery.

{¶ 5} In early September, the newly installed battery ceased operation and was replaced under warranty from the auto parts store. Nevertheless, later that

[1] As acknowledged by PCS in its appellate brief, there was no court reporter at the hearing of this matter, nor is a recording available. Thus, lacking a transcript of proceedings, we rely on the findings of fact included in the magistrate's report. See App.R. 9(C); *Braatz v. Braatz*, 85 Ohio St.3d 40, 1999-Ohio-203, 706 N.E.2d 1218.

month, appellee returned his vehicle to PCS because the speedometer, tachometer, and headlights were not working. Appellee's father retrieved the vehicle two weeks later, on or about October 13, 2008, but PCS had not performed any repairs at that time. Appellee returned the vehicle to PCS the next day. At that time, PCS determined that the alternator was not working properly and replaced it under warranty plus a $50.00 installation fee. The following day, appellee picked up the vehicle from PCS. At that time, the owner of PCS, Paul Zimmer ("Mr. Zimmer"), maintains that the shop mechanic warned appellee of a problem with the wiring harness but that appellee chose to ignore the warning. Appellee denies ever being told of the faulty wiring harness.

{¶ 6} On October 16, 2008, the next day, appellee traveled from Cleveland to Radcliffe, Kentucky, when the vehicle started to smoke and then broke down. Carl's Auto Care & Towing ("Carl's Auto Care") towed the vehicle to Swope Mitsubishi ("Swope") in Radcliffe at a cost of $226.75, that included a new battery, fuses, and a tow. The next day, Swope determined that the cause of the electrical failures to the vehicle was a faulty wiring harness for the alternator. The Swope invoice provided that the alternator overcharged the system and caused the electrical system to burn up. As a result, Swope replaced the alternator, headlights, instrument cluster, the ETACS and an electronic control assembly. These repairs cost a total of $2,598.92.

{¶ 7} After hearing the aforementioned evidence, the magistrate issued its Findings of Facts and Law on April 20, 2009. In the decision, the magistrate

found that PCS breached its contract with appellee by failing to discover the wiring harness problem and notifying appellee of its existence. Accordingly, the magistrate concluded that appellee was entitled to damages in the amount of $2,825.67 with interest, that included the cost of repairs and towing from Carl's Auto Care, and the repairs made by Swope.

{¶ 8} On that same date, the trial court adopted and approved the magistrate's decision prior to PCS filing objections. Thereafter, PCS filed objections to the magistrate's decision and the trial court, in its judgment entry of September 10, 2009, overruled PCS's objections and reinstated its decision in favor of appellee.

{¶ 9} PCS now appeals and presents one assignment for our review. Its sole assignment states:

{¶ 10} "The trial court's judgment in favor of the plaintiff was against the manifest weight of the evidence."

{¶ 11} In a civil action, an appellate court will not reverse a judgment as being against the manifest weight of the evidence where the judgment is supported by some competent, credible evidence going to all essential elements of the case. *C.E. Morris Co. v. Foley Const. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, at syllabus. In other words, the reviewing court should not substitute its judgment for that of the trial court when there exists competent and credible evidence supporting the findings of fact and conclusions of law rendered by the trial judge. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77,

80, 461 N.E.2d 1273. Rather, we must indulge every reasonable presumption in favor of the lower court's judgment and finding of facts. Id. As the trier of fact, the judge or magistrate is in the best position to view the witnesses, determine their credibility, and decide whether to believe all, part or none of their testimony. *DeMoss v. Smailes*, Coshocton App. No. 2009CA00015, 2010-Ohio-1910.

{¶ 12} In this case, the magistrate found that a contract existed between appellee and PCS to repair the electrical problems to appellee's vehicle and that, by failing to detect or notify appellee of the wiring harness problem to the vehicle, PCS breached its contract with appellee. Additionally, the magistrate determined that PCS negligently failed to notify appellee of the wiring harness problem. After reviewing the evidence as outlined above and the pertinent case law, we affirm the finding of the magistrate that PCS breach its contract with appellee and the trial court's adoption of the magistrate's decision.

{¶ 13} In order to recover in this case, appellee needed to demonstrate that (1) a contract existed, (2) appellee performed under that contract, (3) PCS breached the contract, and (4) damages resulted from PCS's breach. See *On Line Logistics, Inc. v. Amerisource Corp.*, Cuyahoga App. No. 82056, 2003-Ohio-5381, at ¶39.

{¶ 14} With regard to the existence of a contract, the court stated in *Reali, Giampetro & Scott v. Society Natl. Bank* (1999), 133 Ohio App.3d 844, 849-850, 729 N.E.2d 1259:

{¶ 15} "While both express and implied contracts require the showing of an agreement based on a meeting of the minds and mutual assent, the manner in which these requirements are proven varies depending upon the nature of the contract. In an express contract, the assent to the contracts terms is formally expressed in the offer and acceptance of the parties. However, in an implied contract, no such formal offer and acceptance occur and no express agreement exists. In contrast, the meeting of the minds must be established by demonstrating that the circumstances surrounding the parties' transaction make it reasonably certain that the contract exists 'as a matter of tacit understanding.' The conduct and declarations of the party must be examined to determine the existence of an intent to be bound. Furthermore, the existence of a contract is generally determined by a court as a matter of law." (Citations omitted.)

{¶ 16} In this case, we agree with the magistrate that an implied contract existed between PCS and appellee to repair all "electrical" problems to appellee's vehicle. PCS maintains that no contract existed between it and appellee to repair the wiring harness to appellee's vehicle. Rather, PCS asserts, the only contract between it and appellee was to replace the alternator and battery in the vehicle. A review of the evidence, however, demonstrates that PCS misclassifies its contract with appellee. We agree with the magistrate's conclusion that the "circumstances surrounding the parties' transaction make it reasonably certain" that an implied contract existed between PCS and appellee to

repair all “electrical” problems associated with the vehicle and not merely just the alternator and battery. See id.

{¶ 17} The testimony, invoices, and repair tags demonstrate that the contract between PCS and appellee was to repair all “electrical” problems associated with the vehicle. The first repair tag prepared by PCS noted under the section entitled “WORK TO BE DONE,” the following:

{¶ 18} “Electrical.”

{¶ 19} “Also after not driven for a few hours when you turn it on it whistles for a min. when you hit the gas.”

{¶ 20} The second repair tag noted under the same section entitled “WORK TO BE DONE,” the following:

{¶ 21} “I got my alternator changed here a month or two ago. I also bought a new battery. Car does not start w/o a jump. Speedometer doesn’t work, lights, etc.”

{¶ 22} Finally, the last repair tag states in the same section:

{¶ 23} “Electrical work. Head lights don’t work, speedometer, RPM gauge.”

{¶ 24} These three repair tags clearly indicate that appellee described the problem with the vehicle to be “electrical.” PCS acknowledged such problems by repeatedly attempting to repair various parts of the vehicle’s electrical system as indicated in its invoices and established via the testimony of both appellee and Mr. Zimmer. As such, we find competent, credible evidence supporting the

magistrate's decision that an implied contract existed between PCS and appellee and that the terms of said contract were not merely to replace the alternator and battery, but to repair all electrical problems with the vehicle.

{¶ 25} With regard to the second element for a breach of contract claim, there can be no dispute that appellee fully performed under the contract. He provided payment for every service performed by PCS.

{¶ 26} Next, we find competent, credible evidence affirming the magistrate's decision that PCS breached its contract with appellee. There is no dispute, and the record clearly demonstrates, that the problem with the vehicle was the wiring harness, and as a result of this problem, the vehicle smoked and broke down when appellee drove to Kentucky. Thus, there can be no question that PCS, who examined the vehicle on three separate occasions, the last time the day prior to the vehicle breaking down, should have repaired, or in the least, discovered the problem with the wiring harness and notified appellee of this defect. Our determination then turns to whether PCS notified appellee of the problem with the wiring harness.

{¶ 27} During the hearing, Mr. Zimmer maintained that appellee ignored a shop mechanic's warning of a problem with the wiring harness. The magistrate, after hearing both Mr. Zimmer's and appellee's testimony, chose to believe appellee and found that PCS failed to notify appellee of the problem. As the evidence in this case is susceptible to more than one interpretation, we must construe it consistently with the magistrate's judgment. As we previously noted,

as the trier of fact, the magistrate is in the best position to view the witnesses, determine their credibility, and decide whether to believe all, part, or none of their testimony. *DeMoss v. Smailes*. Accordingly, we defer to the findings of the magistrate and will not substitute our judgment for that of the magistrate. See *Seasons Coal Co., Inc. v. Cleveland*. In sum, we agree with the magistrate and find competent, credible evidence demonstrating that PCS breached its contract with appellee by failing to notify him of the faulty wiring harness.

{¶ 28} Finally, there is no dispute that appellee sufficiently established he suffered damages as a result of PCS's breach of contract. In awarding damages in a breach of contract action, "[t]he goal is to place the aggrieved party in the position he or she would have been had the breach not occurred." *Baxter v. Kendrick*, 160 Ohio App.3d 204, 208-209, 2005-Ohio-1477, 826 N.E.2d 860. Thus, "the measure of damages in case of a breach of contract is the amount which will compensate the injured person for the loss which a fulfillment of the contract would have prevented or the breach of it has entailed." *Portsmouth Clay Products Co. v. Russell* (1931), 10 Ohio Law Abs. 464.

{¶ 29} In this case, appellee demonstrated, via the invoices from Carl's Auto Care and Swope, that as a result of PCS's failure to notify or detect the faulty wiring harness, the alternator overcharged the electrical system and caused it to burn up. As such, appellee had to pay $226.75 to Carl's Auto Care for a new battery, fuses, and to tow the vehicle to Swope. Additionally, appellee had to pay Swope $2,598.92 to replace the alternator, headlights, instrument

cluster, ETACS, and electronic control assembly which were damaged when the electrical system burned up. Accordingly, we find that the above evidence is competent and credible, meets all elements of a breach of contract claim, and corroborates the court's judgment.

{¶ 30} Having affirmed the trial court's decision finding PCS breached its contract with appellee, we need not review appellee's claim for negligence. The law is well-settled in Ohio that:

{¶ 31} "A breach of contract claim does not create a tort claim, and a tort claim based upon the same actions as those upon which a breach of contract claim is based exists only if the breaching party also breaches a duty owed separately from that duty created by the contract, that is, a duty owed even if no contract existed. *Textron Fin. Corp. v. Nationwide Mut. Ins.* (1996), 115 Ohio App.3d 137, 151, 684 N.E.2d 1261, discretionary appeal not allowed in (1996), 78 Ohio St.3d 1425, 676 N.E.2d 531. Further, there must be damages attributable to the wrongful acts which are in addition to those attributable to the breach of contract." *Prater v. Three C Body Shop, Inc.*, Franklin App. No. 01AP-950, 2002-Ohio-1458.

{¶ 32} In this matter, appellee did not establish a duty additional to that which was contractual. Likewise, there are no different or additional damages attributable to the wrongful acts in the negligence action. Accordingly, we need not review the trial court's finding of negligence after determining that competent

and credible evidence existed to support the breach of contract claim. PCS's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, PRESIDING JUDGE
LARRY A. JONES, J., CONCURS;
COLLEEN CONWAY COONEY, J., CONCURS IN JUDGMENT ONLY