[Cite as *Hayward v. Bellmann*, 2010-Ohio-3438.]

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

Ralph D. Hayward	Court of Appeals No. WM-09-007
Appellant	Trial Court No. 08-CI-141
v.	
Carl W. Bellmann	**DECISION AND JUDGMENT**
Appellee	Decided: July 23, 2010

* * * * *

Ralph D. Hayward, pro se.

* * * * *

HANDWORK, J.

{¶ 1} This case is before the court on appeal from the judgment of the Williams County Court of Common Pleas which, following a jury trial, awarded appellant, Ralph D. Hayward, pro se, judgment against appellee, Carl W. Bellmann, d/b/a Edgerton Auto Salvage, for violations of the Ohio Consumer Sales Practices Act ("CSPA"). The jury awarded appellant $400 in statutory damages for violations of Ohio Adm.Code

109:4-3-13(A)(1) and (2) and, pursuant to a Civ.R. 50(B) motion for judgment notwithstanding the verdict, the trial court awarded appellant an additional $200 in damages for appellee's violation of Ohio Adm.Code 109:4-3-13(C)(12) or (14).

{¶ 2} Appellant timely appealed the decisions of the trial court. Appellee did not respond to the appeal. Appellant raises the following assignments of error:

{¶ 3} "Assignment of Error No. 1:

{¶ 4} "The trial court abused discretion by assessing a portion of court costs against appellant.

{¶ 5} "Assignment of Error No. 2:

{¶ 6} "The trial court erred in failing to settle and approve appellant's statement of evidence.

{¶ 7} "Assignment of Error No. 3:

{¶ 8} "The trial court abused discretion in failing to exclude evidence of appellant's 1987 felony conviction.

{¶ 9} "Assignment of Error No. 4:

{¶ 10} "The trial court erred in prohibiting direct testimony of statements made to appellant by appellee's employee.

{¶ 11} "Assignment of Error No. 5:

{¶ 12} "The trial court abused discretion in denying appellant's request for a jury view of the subject vehicle.

{¶ 13} "Assignment of Error No. 6:

{¶ 14} "The trial court abused discretion in prohibiting appellant from calling adverse witnesses as if on cross-examination.

{¶ 15} "Assignment of Error No. 7:

{¶ 16} "Plain error occurred in the prejudicial effect of appellee's closing argument, as well as the trial court's failure to intervene sua sponte or provide corrective jury instruction.

{¶ 17} "Assignment of Error No. 8:

{¶ 18} "Plain error occurred in the trial court's jury instructions.

{¶ 19} "Assignment of Error No. 9:

{¶ 20} "The jury's failure to award actual damages for appellee's admitted violation of Ohio Adm. Code 109:4-3-13(A)(1) was erroneous as a matter of law.

{¶ 21} "Assignment of Error No. 10:

{¶ 22} "The jury's failure to award actual damages for appellee's admitted violation of Ohio Adm. Code 109:4-3-13(A)(2) was erroneous as a matter of law.

{¶ 23} "Assignment of Error No. 11:

{¶ 24} "The trial court erred in denying judgment notwithstanding the verdict upon appellant's claim that appellee's act of creating an invoice for an amount of $6,700.30, and compelling appellant to pay that amount, after having verbally advised appellant that the final bill was $6,250.00, was deceptive or unconscionable.

{¶ 25} "Assignment of Error No. 12:

{¶ 26} "The trial court erred in denying judgment notwithstanding the verdict upon appellant's claim that appellee's imposition of a mechanic's lien was deceptive or unconscionable."

{¶ 27} The dispute in this matter concerns payment for towing and repair services to a 1974 Jaguar XKE Roadster and a 1992 Porsche 968 Coupe owned by appellant. Appellee towed the vehicles to his business on December 22, 2007. Allegedly, based upon a verbal agreement, appellee was supposed to buy the Jaguar and perform repairs to the Porsche. Despite the alleged agreement to sell the Jaguar to appellee for $6,500, plus repairs to the Porsche, appellant sold the Jaguar to a third party on or about January 25, 2008, for $12,000.

{¶ 28} The initial paint job was unacceptable to appellant and the Porsche was repainted by appellee. Eventually, on February 9, 2008, appellant was informed that the work on the Porsche was complete. Appellee informed appellant that the total cost of service and repairs was $6,250. Appellant disputed that he had agreed to pay that amount for repairs, but was informed by appellee that he would retain the Porsche until appellant paid for the repairs. After the Williams County Sheriff's Department refused to get involved, on February 14, 2008, appellant demanded a detailed invoice from appellant and requested that all parts and supplies be returned to him when he retrieved the Porsche. When appellant arrived to pay for the Porsche, he was given an invoice totaling $6,700.30, which added sales tax to the repair costs. On February 16, 2008, although appellant only

brought a cashier's check in the amount of $6,250, and disputed the amount owed, appellant paid the additional balance due with a debit card, and obtained possession of the Porsche.

{¶ 29} Appellant, pro se, sued appellee on April 29, 2008. Appellant pled five separate bases for recovery against appellee, including, negligently repairing the Porsche and failing to return newly purchased parts to appellant, purposefully and knowingly engaging in tortious conduct by imposing a mechanic's lien on the Porsche without lawful justification, purposefully and knowingly defrauding appellant with respect to the valuation of the Jaguar and costs of services and repairs for the Porsche, and numerous violations of the CSPA. Specifically, appellant asserted that appellee was in violation of Ohio Adm.Code 109:4-3-13(A)(1) and (2), (B)(2), (C)(7), (11) and (12) or (14). Appellant also alleged that appellee was in violation of R.C. 1345.02(A) and (B)(2), and R.C. 1345.03(B)(5) and (6).

{¶ 30} Initially, we will address appellant's second assignment of error. Appellant argues that the trial court erred in failing to settle and approve appellant's statement of evidence. Appellant's assignment of error refers to the fact that, rather than paying the trial court's court reporter[1] to prepare a certified transcript of the trial proceedings, appellant, using the publicly available audio recording of the trial, transcribed the trial proceedings himself. Appellee objected to the use of an uncertified transcript of the

[1]The trial court's court reporter was present during the trial and contemporaneously made a stenographic record of the proceedings.

proceedings, arguing that appellant was not indigent because he owned the Porsche, which he could sell to pay for a certified transcript. The trial court refused to approve the proposed statement of the proceedings, finding that appellant was not indigent and, therefore, was not entitled to make use of App.R. 9(C) because a certified transcription of the proceedings was available to him.

{¶ 31} In *State ex rel. Motley v. Capers* (1986), 23 Ohio St.3d 56, 58, the Ohio Supreme Court held that, even though a court reporter was present at trial and able to provided a certified transcript, App.R. 9(C) allows an indigent appellant to preserve his right to appeal:

{¶ 32} "The narrative statement provided for in App.R. 9(C) is an available, reliable alternative to an appellant unable to bear the cost of a transcript. Thus, in order to preserve an indigent appellant's right to appeal under Ohio law, we will not limit the use of App.R. 9(C) narrative statements to only those cases where a transcript is physically unavailable. Rather, we find that a transcript is unavailable for the purposes of App.R. 9(C) to an indigent appellant unable to bear the cost of providing a transcript."

{¶ 33} In this case, based on the testimony and evidence submitted during trial, the trial court found that appellant was the sole owner of the Porsche and that it was free and clear of all liens. The trial court also found that appellant held a Bachelor of Arts degree in international studies, completed some graduate studies in business, received monthly payments from his credit card processing business, and that appellant testified his Porsche was worth $15,000. The trial court also noted that, according to defense counsel's

affidavit, the Kelley Blue Book value of the Porsche following the trial was $11,000. The trial court found that the cost of the transcript for the appellate court would be between $2,500 and $3,000. Because appellant owned a valuable asset and received a monthly income, the trial court determined that an official transcript was available to appellant and that "no hearing on a settlement or approval of a proposed statement of evidence is necessary as a transcript is available under App.R. 9(C)."

{¶ 34} On appeal, appellant argues that the trial court abused its discretion in determining that he was not indigent. Specifically, appellant argues that the present value of the Porsche was not entered into evidence, that he owes his brother $5,000 for the car, and that even if the Porsche could be sold for an amount in excess of the court reporter transcript fee, the trial court failed to determine if selling the Porsche would cause an undue hardship. Appellant asserts that the trial court's refusal to settle and approve his statement of evidence is prejudicial to his right to perfect an appeal on the merits.

{¶ 35} We agree with the trial court. App.R. 9(C) provides a means by which an indigent person, unable to bear the costs of a certified trial transcript, can preserve his issues for appeal. In this case, however, the trial court determined that appellant was not indigent and, in fact, was able to afford to pay for a certified transcript. Appellee provided a Kelley Blue Book estimate that the Porsche's retail value was $11,000, assuming it had 77,000 miles and was in excellent condition. On June 10, 2009, appellant, however, offered a Kelley Blue Book estimate that the Porsche's private party value was $5,350, assuming it had 144,981 miles and was in fair condition. In either event, in addition to the

value of the Porsche, appellant received monthly income from his credit card processing business. Additionally, based upon appellant's complaint, we note that the $5,000 appellant owed his brother was based upon the sale of the Jaguar, not the Porsche. Accordingly, we find that the trial court did not abuse its discretion in determining that appellant was not indigent or unable to pay for a certified transcript. That being the case, we find that appellant was not entitled to substitute an App.R. 9(C) statement in place of a certified transcript of the trial proceedings. Appellant's second assignment of error is therefore found not well-taken.

{¶ 36} Appellant argues in his first assignment of error that the trial court abused its discretion by assessing a portion of court costs against appellant. Specifically, appellant argues that because he was awarded damages on three provisions of the CSPA, he was the "prevailing party" and, as such, should not have had to pay court costs.

{¶ 37} Generally, court costs will be assessed to the prevailing party; however, the rule does not grant an absolute right to recover costs. *State ex rel. Gravill v. Fuerst* (1986), 24 Ohio St.3d 12, 13. Civ.R. 54(D) states, "Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed to the prevailing party unless the court otherwise directs." The assessment of court costs, therefore, is within the discretion of the trial court. *State ex rel. Fant v. Regional Transit Auth.* (1990), 48 Ohio St.3d 39. There is no suggestion in Civ.R. 54(D) that the party who succeeds on the question of liability must necessarily be deemed the prevailing party, particularly when

the party's recovered damages fall well below those requested. *Akron Precision Striping, Inc. v. Conley* (Oct. 17, 1990), 9th Dist. No. 14619.

{¶ 38} In this case, appellant sought damages in excess of $10,000 in addition to the statutory damages he would be entitled to for violations of the CSPA. Appellant was awarded $600 for statutory damages and was awarded nothing for economic or non-economic damages arising out of appellee's repair of the Porsche or valuation of the Jaguar. Accordingly, we find that the trial court did not abuse its discretion in ordering that appellant's deposits with the court, totaling $804, should go toward court costs, with the balance owed to be paid by appellee. Appellant's first assignment of error is therefore found not well-taken.

{¶ 39} Appellant's third through eighth assignments of error concern discretionary issues determined by the trial court during trial, which included: allowing examination of appellant regarding a prior felony conviction; prohibiting appellant from repeating statements made to him by appellee's employees; denying appellant's request for a jury view of the Porsche; prohibiting appellant from cross-examining allegedly hostile witnesses, who appellant called during his case-in-chief; allowing defense counsel to make prejudicial comments during closing argument; and failing to sua sponte list the CSPA claims alleged by appellant in the jury instructions.

{¶ 40} In order to support these assignments of error, appellant had the duty to provide this court with either a transcript of the trial or a substitute for that transcript as provided for by App.R. 9. As discussed above, we affirm the trial court's refusal of

appellant's App.R. 9(C) statement of the evidence, since appellant was able to provide a certified transcript. As such, no trial transcript upon which we can rely was submitted for our review on appeal. "When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. Accordingly, we find appellant's third, fourth, fifth, sixth, seventh, and eighth assignments of error not well-taken.

{¶ 41} Appellant argues in his ninth and tenth assignments of error that the jury's failure to award actual damages for appellee's admitted violation of Ohio Adm.Code 109:4-3-13(A)(1) and (2)[2] was erroneous as a matter of law. We disagree.

---

[2]Ohio Adm.Code 109:4-3-13 states:

"(A) It shall be a deceptive act or practice in connection with a consumer transaction involving the performance of either repairs or any service upon a motor vehicle where the anticipated cost exceeds twenty-five dollars and there has been face to face contact at the supplier's place of business during the hours such repairs or services are offered, between the consumer or his representative and the supplier or his representative, prior to the commencement of the repair or service for a supplier to:

"(1) Fail, at the time of the initial face to face contact and prior to the commencement of any repair or service, to provide the consumer with a form which indicates the date, the identity of the supplier, the consumer's name and telephone number, the reasonably anticipated completion date and, if requested by the consumer, the anticipated cost of the repair or service. The form shall also clearly and conspicuously contain the following disclosures in substantially the following language:

{¶ 42} Pursuant to R.C. 1345.02(B), where an act or practice has violated R.C. 1345.02, "the consumer may rescind the transaction or recover * * * three times the amount of the consumer's actual economic damages or two hundred dollars, whichever is greater, plus an amount not exceeding five thousand dollars in noneconomic damages * * *." Thus, if the jury determined that appellant's actual damages incurred as a result of appellee's violation of Ohio Adm.Code 109:4-3-13(A)(1) and (2) amounted to less than $200, then appellant would be entitled to statutory damages in the amount of $200 with respect to each violation. Appellant is not entitled to both actual and statutory damages.

"'Estimate

"You have the right to an estimate if the expected cost of repairs or services will be more than twenty-five dollars. Initial your choice:

"_____ written estimate

"_____ oral estimate

"_____ no estimate'

"(2) Fail to post a sign in a conspicuous place within that area of the supplier's place of business to which consumers requesting any repair or service are directed by the supplier or to give the consumer a separate form at the time of the initial face to face contact and prior to the commencement of any repair or service which clearly and conspicuously contains the following language:

"'Notice

"If the expected cost of a repair or service is more than twenty-five dollars, you have the right to receive a written estimate, oral estimate, or you can choose to receive no estimate before we begin work. Your bill will not be higher than the estimate by more than ten per cent unless you approve a larger amount before repairs are finished. Ohio law requires us to give you a form so that you can choose either a written, oral, or no estimate.'"

{¶ 43} Based upon the jury's award of $400 in statutory damages, it is evident that the jury determined appellant's damages resulting from each violation totaled less than $200. The jury's award in this regard resulted from its determination of the weight of the evidence and, as such, is not "erroneous as a matter of law." To the extent that appellant argues that the jury's verdict is against the manifest weight of the evidence, we note that, in order to conduct such a review, we require a valid transcript of the trial proceedings, which we were not provided. Accordingly, we find appellant's ninth and tenth assignments of error not well-taken.

{¶ 44} Appellant argues in his 11th and 12th assignments of error that the trial court erred in denying his motion for judgment notwithstanding the verdict ("JNOV".) Specifically, appellant claims that appellee's behavior was deceptive or unconscionable when he verbally advised appellant that the final bill was $6,250, but then presented him with an invoice totaling $6,700.30, and when appellee imposed a mechanic's lien on the Porsche. Appellant argues that appellant's behavior was "a per se violation of the CSPA, a strict liability statute."

{¶ 45} A motion for a JNOV is provided for under Civ.R. 50(B) and is reviewed under a de novo standard. *Boston v. Sealmaster Industries*, 6th Dist. No. E-03-040, 2004-Ohio-4278, ¶ 25. A motion for a JNOV "does not present factual issues, but a question of law, even though in deciding such a motion, it is necessary to review and consider the evidence." *O'Day v. Webb* (1972), 29 Ohio St.2d 215, paragraph three of the syllabus. A motion for a JNOV should be denied if there is substantial evidence upon which

reasonable minds could come to different conclusions on the essential elements of the claim. *Posin v. ABC Motor Court Hotel* (1976), 45 Ohio St.2d 271, 275.

{¶ 46} Again, without a valid transcript, we are unable to pass on the merits of appellant's arguments. Appellant's 11th and 12th assignments of error are therefore found not well-taken.

{¶ 47} On consideration whereof, the court finds substantial justice has been done the party complaining and the judgment of the Williams County Court of Common Pleas is affirmed. Appellant is ordered to pay the 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