[Cite as *Mike Castrucci Ford Sales, Inc. v. Hoover*, 2009-Ohio-4823.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

MIKE CASTRUCCI FORD SALES, INC.,	:	
Plaintiff-Appellant,	:	CASE NO. CA2009-03-016 (Accelerated Calendar)
	:	
- vs -	:	O P I N I O N 9/14/2009
GEORGE W. HOOVER,	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2005-CVH-00501

Taft Stettinius & Hollister LLP, Timothy C. Sullivan, 425 Walnut Street, Suite 1800, Cincinnati, OH 45202, for plaintiff-appellant

Cors & Bassett, LLC, Kevin R. Feazell, 537 East Pete Rose Way, Suite 400, Cincinnati, OH 45202, for defendant-appellee

YOUNG, J.

{¶1} Plaintiff-appellant, Mike Castrucci Ford Sales, Inc. (Castrucci), appeals a decision of the Clermont County Common Pleas Court awarding $36,622.25 in attorney fees to defendant-appellee, George W. Hoover (Hoover), in an action brought under the Ohio Consumer Sales Practices Act (CSPA). We affirm the decision of the trial court.

{¶2} On January 11, 2005, Hoover entered into a contract with Castrucci for the

purchase of a 2005 Ford GT. The purchase price for the vehicle was $212,500 and Hoover tendered a deposit to Castrucci in the amount of $25,000. Approximately 11 weeks later, on March 29, 2005, Hoover had not received the vehicle and contacted Castrucci and demanded the return of his deposit.

{¶3} In response to his demand, Castrucci filed suit against Hoover on April 6, 2005 alleging breach of contract and anticipatory repudiation of the contract. Hoover answered and asserted a counterclaim against Castrucci, alleging violations of the CSPA. Hoover averred that Castrucci failed to tender a proper receipt for his deposit in violation of Ohio Adm.Code 109:4-3-07(B), and failed to deliver the vehicle within eight consecutive weeks of the delivery date in violation of Ohio Adm.Code 109:4-3-09(A). Hoover sought compensatory and treble damages in the amount of $75,000, as well as attorney fees.

{¶4} The record indicates that on May 24, 2005, approximately three weeks after Hoover's answer and counterclaim was served, Castrucci mailed Hoover a check for $25,000. Hoover, however, construed the check as a settlement offer and returned it to Castrucci. The funds were subsequently deposited with the trial court pending resolution of the parties' claims.

{¶5} A bench trial on the matter was held on April 28, 2006. In its decision and entry, the court found that Castrucci had provided Hoover with the required receipt, but failed to deliver the vehicle within eight weeks of the date of his deposit in violation of the CSPA. The court determined that Hoover had elected to rescind the transaction and was therefore entitled only to the return of his deposit plus interest. The court also found that Hoover was not entitled to an award of attorney fees because the bulk of the fees were incurred due to his rejection of the return of the deposit and his unsuccessful pursuit of treble damages.

{¶6} Hoover appealed the trial court's decision to this court in *Mike Castrucci Ford Sales, Inc. v. Hoover*, Clermont App. No. CA2007-02-022, 2008-Ohio-1358 (*Castrucci I*). In

Castrucci I, we affirmed the trial court's determination that Hoover had elected the remedy of rescission, but reversed and remanded the case on the issue of attorney fees.[1] Id. at ¶20, 30. We noted that the trial court did not obtain a breakdown of attorney fees prior to its decision to deny Hoover's request. Id. at ¶30. We also noted that Hoover, a resident of the state of California, was made to defend himself in a foreign jurisdiction on Castrucci's claims because he requested a legal remedy to which he was entitled. Id. In addition, the record indicated that after Castrucci attempted to refund Hoover's deposit, Castrucci did not offer to dismiss its claims against Hoover. As a result, Hoover "necessarily needed to continue to accrue legal fees to defend himself." Id. Based upon those facts, we found that the trial court's decision to award no fees shocked the conscience of the court. Id.

{¶7} Castrucci subsequently appealed this court's decision to the Ohio Supreme Court, which declined to accept the case for review.

{¶8} On remand, Hoover submitted an application for $30,860.25 in fees for 166.15 hours of work performed from April 30, 2005 to March 25, 2008. Hoover submitted a second application seeking another $5,827 in fees incurred as a result of an additional 28.15 hours of work relating to Castrucci's appeal to the Ohio Supreme Court and the preparation of his supplemental fee application. Both applications were supported by affidavits from Hoover's attorneys. The trial court held a hearing on the fee applications in January 2009, and awarded Hoover $36,622.25, nearly all those requested.

{¶9} Castrucci has appealed the trial court's fee award, advancing the following sole assignment of error:

{¶10} "THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO THE PREJUDICE OF [CASTRUCCI] WHEN IT AWARDED [HOOVER] ALL OF THE ATTORNEY

1. The parties did not challenge the trial court's finding that Castrucci violated the CSPA. Id. at ¶14.

FEES HE INCURRED IN THIS CASE, ALMOST ALL OF WHICH UNDENIABLY WERE INCURRED TO PROSECUTE A COUNTERCLAIM FOR TREBLE DAMAGES UPON WHICH HE DID NOT PREVAIL."

{¶11} It is well-established that a trial court's determination with regard to an award of attorney fees will not be disturbed on appeal absent an abuse of discretion. *Bittner v. Tri-County Toyota, Inc*. (1991), 58 Ohio St.3d 143, 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. Where a court is empowered to award attorney fees by statute, "[u]nless the amount of fees determined is so high or so low as to shock the conscience, an appellate court will not interfere." *Bittner* at 146, quoting *Brooks v. Hurst Buick-Pontiac-Olds-GMC, Inc*. (1985), 23 Ohio App.3d 85, 91. In making a fee determination, the trial court has an "infinitely better opportunity to determine the value of services rendered by lawyers who have tried a case before him than does an appellate court." Id.

{¶12} The statutory provision at issue in this appeal is R.C. 1345.09(F)(2), which provides that "[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 [the CSPA]." The party requesting an attorney fee award under the CSPA must first be the "prevailing party." In order for a formal prevailing party to exist, there must be an adjudication on the merits of their claim. *Sturm v. Sturm* (1992), 63 Ohio St.3d 671, 675.

{¶13} A prevailing party may also recover attorney fees incurred on an appeal of an action brought under the CSPA. A party "'prevails' on appeal within the meaning of R.C. 1345.09(F) if it obtains a substantial modification of the trial court's judgment." *Parker v. I & F Insulation Co., Inc*., 89 Ohio St.3d 261, 2000-Ohio-151, paragraph one of the syllabus. In

order to establish that a substantial modification occurred, it is not necessary for the prevailing party to have a "complete victory" on appeal such that the entire matter is determined in that party's favor without a remand to the trial court for further proceedings. Id. at 265, citing *Korn v. State Med. Bd*. (1991), 71 Ohio App.3d 483, 487. In *Parker*, the court noted that "[t]he work of the attorney on appeal is part of the legal process of achieving and maintaining the judgment for the consumer. Disallowing attorney fees for appellate work undermines the purpose of the [CSPA]." Id. at fn.1, quoting *Tanner v. Tom Harrigan Chrysler Plymouth, Inc*. (1991), 82 Ohio App.3d 764, 766.

{¶14} With regard to the reasonableness of the fee award, the Ohio Supreme Court has set forth a two-part process a trial court is to follow when determining the amount of fees to award the prevailing party. *Bittner*, 58 Ohio St.3d at 145. Pursuant to *Bittner*, the trial court should first calculate the number of hours reasonably expended on the case multiplied by a reasonable hourly rate. Id. This calculation provides "an objective basis on which to make an initial estimate of the value of a lawyer's services." Id. During the initial calculation, the court should exclude any hours which were unreasonably expended. See *Bergman v. Monarch Construction Co*., Butler App. No. CA2008-02-044, 2009-Ohio-551, ¶107. "Unreasonably expended hours are generally categorized as those which are excessive in relationship to the work done, are duplicative or redundant, or are simply unnecessary." Id., quoting *Gibney v. Toledo Bd. of Educ*. (1991), 73 Ohio App.3d 99, 108.

{¶15} The court may then modify its initial calculation after applying the factors listed in DR 2-106(B).[2] *Bittner* at 145. Those factors include: "the time and labor involved in maintaining the litigation; the novelty and difficulty of the questions involved; the professional skill required to perform the necessary legal services; the attorney's inability to accept other

2. DR 2-106 has been replaced by Prof. Cond. Rule 1.5. The factors contained in both the code and the professional rules are virtually identical. See *Bergman* at fn. 6.

cases; the fee customarily charged; the amount involved and the results obtained; any necessary time limitations; the nature and length of the attorney/client relationship; the experience, reputation, and ability of the attorney; and whether the fee is fixed or contingent." Id. at 145-146. The trial court has the discretion to determine which factors to apply, and the manner in which the application of the factors will affect the court's initial calculation. Id. at 146.

{¶16} In this appeal, Castrucci does not challenge the number of hours expended by Hoover's attorneys or the rates at which the hours were billed. Instead, throughout its brief Castrucci characterizes Hoover's treble damages request as a "claim," and contends that because Hoover failed to recover damages, he cannot be considered a prevailing party under R.C. 1345.09(F)(2). Castrucci also argues that the trial court should have differentiated between the fees incurred before Castrucci attempted to refund Hoover's deposit on May 24, 2005, and those incurred after the refund was rejected. Castrucci points to the fact that the fees incurred before the attempted refund were $1,240 (relating to the filing of the answer and counterclaim), and that the fees incurred after May 24 related to Hoover's unsuccessful pursuit of treble damages. As a result, Castrucci argues that the fee award should not have exceeded $1,240, and that the additional award was unreasonable and constituted an abuse of the trial court's discretion.

{¶17} As an initial matter, we note that Castrucci failed to include a transcript of the January 2009 hearing on Hoover's fee request in the record on appeal. "Upon appeal of an adverse judgment, it is the duty of the appellant to ensure that the record, or whatever portions thereof are necessary for the determination of the appeal, are filed with the court in which he seeks review." *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 19. As a result, we must presume the regularity and validity of the trial court's proceedings. See *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197.

{¶18} The trial court issued a detailed decision regarding Hoover's attorney fees request. In addressing whether Hoover was the "prevailing party" at trial, the court rejected Castrucci's argument that he had not prevailed on his underlying claim. The court differentiated between a claim under the CSPA, and the subsequent remedies afforded a successful consumer once a violation is established, concluding that the CSPA claim and Hoover's entitlement to damages or rescission were separate issues. The trial court reiterated its previous finding that Castrucci had violated the CSPA, and although Hoover sought a remedy to which he was not entitled, i.e., treble damages, this did not negate the fact that he had successfully prosecuted a CSPA claim against Castrucci and was awarded the remedy of rescission. As a result, the court found that Hoover was the prevailing party at trial on his CSPA claim. We find no error in this determination, as the term "prevailing party" includes a consumer who is awarded either damages or rescission at trial for a seller's violation of the CSPA. See *Brenner Marine, Inc. v. George Goudreau Jr. Trust* (Jan. 13, 1995), Lucas App. No. L-93-077, 1995 WL 12118 at *5.

{¶19} The trial court also found that Hoover was the prevailing party on his appeal of *Castrucci I*. The court determined that Hoover had obtained a substantial modification of its judgment by successfully obtaining a remand of the case on the issue of attorney fees. In addition, the court found that Hoover successfully defended this modification at the Ohio Supreme Court upon Castrucci's appeal. We find no error in the court's conclusion, and Castrucci has not disputed the court's determination with regard to this issue.

{¶20} With respect to the reasonableness of the fee award, our review of the record indicates that the trial court's calculation of the fees was consistent with the requirements set forth in *Bittner*. In its decision, the court noted that Castrucci did not contest the reasonableness of the rates charged or the hours expended on the CSPA claims. Nevertheless, the court found that Hoover's attorneys' affidavits were sufficient to support a

finding that the hours and rates were reasonable, in light of its "knowledge of hourly rates charged in this geographical area." The court appears to have reviewed the billing statements in close detail, noting a duplicate entry on March 25, 2008 charging $65.00 for a telephone call. The court subtracted this from the total amount requested and concluded that the number of hours reasonably expended on the case multiplied by the reasonable hourly rates set forth in the attorneys' affidavits equaled $36,622.25.

{¶21} The court also concluded that although Hoover was not successful at trial on his additional claim that Castrucci had failed to tender a proper receipt for his deposit, based upon its review, the court could not discern from the billing statements when work was being performed on Hoover's receipt claim as opposed to the eight-week-rule claim. Citing our decision in *Moore v. Vandemark Co., Inc*., Clermont App. No. CA2003-07-063, 2004-Ohio-4313, ¶30, the court found that the claims presented a "common core of facts and related legal theories," and treated the total number of hours expended on both claims together as "reasonably expended hours."

{¶22} The court also applied the factors set forth in Prof. Cond. Rule 1.5, and found that the requested fees were in line with the time, labor and skill required for the case. The court noted that the questions involved were not particularly novel or difficult, and determined that the hours expended reflected this fact. The court also stated that, based upon its experience, the fees charged by Hoover's attorneys reflected those customarily charged in the locality for similar legal services.

{¶23} Although the trial court acknowledged that the bulk of the fees were incurred after Hoover rejected the refund, the court was not persuaded by Castrucci's argument that the only fees reasonably incurred by Hoover's attorneys were for the preparation of his answer and counterclaim. A key component to the court's analysis was the fact that Castrucci "unwisely, and for reasons unknown," did not offer to dismiss its claims against

Hoover upon offering to refund the deposit. As a result of this "imprudent choice," the court concluded that Hoover still had to incur attorney fees to defend against the claims set forth in Castrucci's complaint.

{¶24} Based upon the foregoing, and after a close review of the record, we conclude that the trial court's decision awarding Hoover $36,622.25 in attorney fees was not unreasonable, arbitrary or unconscionable so as to constitute an abuse of its discretion. Castrucci's assignment of error is therefore overruled.

{¶25} Judgment affirmed.

POWELL, P.J., and RINGLAND, J., concur.

[Cite as *Mike Castrucci Ford Sales, Inc. v. Hoover*, 2009-Ohio-4823.]