

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 24, 2015 Session

WUBALEM GEBREMEDHIN v. NEW DAY AUTO SALES, INC.

**Appeal from the Circuit Court for Davidson County
No. 13C630 Amanda Jane McClendon, Judge**

No. M2014-01803-COA-R3-CV – Filed June 8, 2015

Plaintiff who purchased a used automobile sued the dealership for damages asserting various statutory and common law causes of action arising out of the sale, financing, repossession and subsequent resale of the automobile. Following a trial in which the jury found in Plaintiff's favor on a claim under the Tennessee Consumer Protection Act and on several common law claims, Plaintiff moved the court for an award of attorney's fees; the court awarded \$10,000.00 of the requested \$72,909.00 sought. Plaintiff appeals. Because the trial court did not state the factual or legal basis for the award of fees, this court cannot properly perform its review function; accordingly, we vacate the judgment of the trial court and remand the case for reconsideration and entry of an order setting forth the factual and legal basis of the award.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated;
Case Remanded.**

RICHARD H. DINKINS, J., delivered the opinion of the court, in which ANDY D. BENNETT and W. NEAL MCBRAYER, JJ., joined.

Robert C. Bigelow and Joshua L. Burgener, Nashville, Tennessee, for the appellant, Wubalem Gebremedhin.

Michael H. Rowan, Nashville, Tennessee, for the appellee, New Day Auto Sales, Inc.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

On December 15, 2011, Wubalem Gebremedhin ("Plaintiff") purchased a 2005 Honda Accord for \$8,250.56 from New Day Auto Sales, Inc. ("Defendant"). Plaintiff

made a downpayment of \$3,500.00 and financed the remaining balance at \$150.00 per month; as of March 31, 2012, Plaintiff had made \$750.00 in payments to Defendant. On May 2, Defendant repossessed the automobile and sold it.

Plaintiff filed suit in General Sessions Court for intentional misrepresentation, fraud, coercion, breach of contract, and violations of the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, and the Tennessee Consumer Protection Act (“TCPA”), Tenn. Code Ann. § 47-18-101, *et seq.*, arising out of the purchase and repossession of the car. The court entered a judgment in favor of Plaintiff of \$5,652.50.¹ Defendant appealed the judgment to the Davidson County Circuit Court; Plaintiff also appealed. In Circuit Court Plaintiff amended the complaint, adding a claim that Defendant violated various provisions of the Uniform Commercial Code, specifically Tenn. Code Ann. §§ 47-9-610–616.

The case was tried before a jury, and at the close of the proof, Plaintiff moved for a directed verdict on two claims: that the sale of the car after repossession was not commercially reasonable as required by Tenn. Code Ann. § 47-9-610 and that he was not properly notified of the sale in compliance with Tenn. Code Ann. § 47-9-614. The court denied the motion as to § 47-9-610 and granted the motion as to § 47-9-614. The jury found in favor of Plaintiff on the following claims and awarded damages accordingly: \$500.00 for an unfair or deceptive act in violation of the TCPA; \$3,500.00 for negligent misrepresentation arising out of the purchase and financing of the Honda; \$1,000.00 for conversion of the Honda; \$500.00 for fraud; and \$500.00 for breach of contract. The jury did not award damages for violation of Tenn. Code Ann. § 47-9-614 upon which the court had directed a verdict for Plaintiff and found in favor of Defendant on Plaintiff’s claim pursuant to Tenn. Code Ann. § 47-9-610. The court entered judgment on the jury verdict.

Plaintiff moved for treble damages under the TCPA and for damages pursuant to the UCC. Following a hearing, the court awarded damages pursuant to Tenn. Code Ann. § 47-9-625 of \$475.00 for “Defendant’s violation of Tenn. Code Ann. §§ 47-9-611–614”; the court reserved ruling on treble damages. Plaintiff then moved pursuant to the TCPA for an award of attorneys’ fees in the amount of \$72,909.00 and \$4,537.95 in costs. Following a hearing on the motions for treble damages and fees, the court declined to award treble damages and awarded \$10,000.00 in attorneys’ fees and \$3,584.00 in discretionary costs.

Plaintiff appeals, contending that the court abused its discretion when it only granted \$10,000.00 in attorneys’ fees; specifically, Plaintiff argues that the court failed to

¹ The factual and legal basis for the judgment and computation of damages is not apparent from the record.

apply the correct legal standard in making the award. Plaintiff does not appeal the award of costs.

II. DISCUSSION

The TCPA provides that, where a trial court finds that a violation of the TCPA has occurred, it may award reasonable attorneys' fees and costs to the party bringing the proceeding. When making an award of attorney's fees under the Act, trial courts are to consider the factors set forth in *Connors v. Connors*, 594 S.W.2d 672 (Tenn. 1980), and, when appropriate, the guidelines listed in Supreme Court Rule 8, RPC 1.5.² *Brooks v. Tenn. Farmers Mut. Ins. Co.*, No. M2013-02326-COA-R3-CV, 2014 WL 6735129 at *9 (Tenn. Ct. App. Nov. 26, 2014). The "determination of reasonable attorneys' fees is necessarily a discretionary inquiry" by the trial court; absent an abuse of that discretion, we will uphold the trial court's decision. *Keith v. Howerton*, 165 S.W.3d 248, 250-51

² The *Connors* factors include:

1. The time devoted to performing the legal service.
2. The time limitations imposed by the circumstances.
3. The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
4. The fee customarily charged in the locality for similar legal services.
5. The amount involved and the results obtained.
6. The experience, reputation, and ability of the lawyer performing the legal service.

Connors, 594 S.W.2d at 676. The Tennessee Supreme Court Rule 8, Rule of Professional Conduct 1.5 lists similar criteria, though not identical to the *Connors* guidelines. The Rule provides:

The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) whether the fee is fixed or contingent;
- (9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
- (10) whether the fee agreement is in writing.

Tenn. S.Ct. R. 8, RPC 1.5.

(Tenn. Ct. App. 2005) (quoting *Killingsworth v. Ted Russell Ford*, 104 S.W.3d 530, 534 (Tenn. Ct. App. 2002)).

At the hearing, without objection Plaintiff presented the affidavits of Robert Bigelow, lead counsel for Plaintiff, and Jonathan Patton, associate counsel; no testimony or other proof was offered by either party. Mr. Bigelow's affidavit set forth the hours that he and Mr. Patton expended, as well as the services they performed, in the course of litigating Plaintiff's claims; that Mr. Bigelow's "average hourly rate"³ was \$292.93 and Mr. Patton's was \$238.79; and that Plaintiff claimed costs and expenses totalling \$4,923.10.

In ruling from the bench, the court stated:

Recovery of attorney's fees is a tool utilized to encourage the vindication of identified policy and rights, and from what I could tell, the majority of the cases that were submitted in support of the attorney's fees really involve civil rights and discrimination cases.

This case is no less important. However, we are dealing with a small business and there were at least two attorneys involved so - - and there does seem to be some excessive fees being sought in terms - - and I'm not trying to criticize Mr. Bigelow. I'm glad your firm took this case. But the amount of time that's spent on doing research, that sort of thing is what I'm referencing.

I do think attorney's fees of some sort is indicated, though, because it's just not fair. And I believe you when you say you took it pro bono. You took it without the expectation of making any money, which is admirable. So I'm going to give you some money, but it's not, definitely, as much as you're seeking.

And what I'm going to award is \$10,000 in attorney's fees, and it's probably a basis for appeal, but I'm going to say as an attorney who was in private practice for 23 years, I would have been very happy to receive that award under these circumstances of this case.

The ruling was memorialized in an order, which stated: "Plaintiff's Motion for Attorney's Fees and Costs is granted, in part, and denied, in part. Plaintiff is awarded \$10,000.00 of the \$72,909.00 in attorneys' fees requested."

³ The record does not indicate how the respective hourly rates were calculated.

When we review a trial court's discretionary decision we consider "(1) whether the factual basis for the decision is properly supported by sufficient evidence; (2) whether the trial court has correctly identified and properly applied the applicable legal principles; and (3) whether the trial court's decision is within the range of acceptable alternatives." *Flautt & Mann v. Council of Memphis*, 285 S.W.3d 856, 873 (Tenn. Ct. App. 2008) (quoting *BIF, a Div. of Gen. Signal Controls, Inc. v. Service Constr. Co.*, No. 87-136-II, 1988 WL 72409, at *3 (Tenn. Ct. App. July 13, 1988)).

Unfortunately, neither the oral ruling nor the order addresses the factors that the court considered or the facts found which support an award of \$10,000.00. The purpose of the court in articulating its factual and legal basis is to ensure that the court did not act arbitrarily, but made a "conscientious judgment." See *Flautt & Mann*, 285 S.W.3d at 872 (quoting *Jenkins v. State*, 496 S.W.2d 521, 523 (Tenn. Crim. App. 1973)). Absent an understanding of the factual and legal basis for the decision, we are unable to determine whether the court abused its discretion. Consequently, we find it necessary to vacate the judgment and remand the case for reconsideration of the award and entry of an order setting forth the legal and factual basis of the amount to be awarded.

While Plaintiff asks that this court make an award of fees based on the record presented, our function is to review the decision of the trial court. Moreover, the evidentiary record before us is inadequate to permit an analysis of the *Connors* factors and the guidelines at Sup. Ct. R. 8.

III. CONCLUSION

For the foregoing reasons, the judgment of the trial court is vacated and the case remanded for further proceedings in accordance with this opinion.

RICHARD H. DINKINS, JUDGE