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IN THE
COURT OF APPEALS OF INDIANA

Horizon Bank,
Appellant-Defendant,

v.

Fabian Huizar,
Appellee-Plaintiff,

October 13, 2021

Court of Appeals Case No. 20A-CT-1937

Appeal from the Tippecanoe Circuit Court

The Honorable Sean Persin, Judge

Trial Court Cause No. 79C01-1811-CT-178

Robb, Judge.

Case Summary and Issues

[1] Horizon Bank ("Horizon"), through an independent contractor, repossessed a Ford Explorer owned by Fabian Huizar due to late payment. Subsequently, Huizar filed a complaint against Horizon alleging that Horizon violated the Deceptive Consumer Sales Act ("DCSA"), the Indiana Uniform Commercial Code ("IUCC"), the Crime Victims Relief Act ("CVRA"), and the Fair Debt Collection Practices Act ("FDCPA"). On September 21, 2020, the trial court entered its Final Appealable Order on All Issues finding: Horizon's repossession of Huizar's vehicle constituted a breach of the peace; Horizon is not a debt collector under the FDCPA; Horizon is liable for statutory damages under the DCSA, however, emotional distress damages are not recoverable under the act; Horizon's breach of the peace violated the IUCC; Huizar is not entitled to actual damages under the CVRA; and Huizar is entitled to costs and attorney's fees under the CVRA, IUCC and DCSA.

[2] Horizon now appeals, raising multiple issues for our review, which we consolidate and restate as: (1) whether the trial court abused its discretion by finding that Horizon breached the peace; (2) whether the trial court erred by finding Horizon was liable under the DCSA; and (3) whether the trial court erred by awarding Huizar attorney's fees under the IUCC and CVRA.

[3] Huizar cross-appeals, raising the following restated issues: (A) whether Huizar judicially admitted that Horizon was not a debt collector under the FDCPA; (B) whether the trial court erred by not awarding emotional distress damages under

the DCSA; (C) whether the trial court erred by not granting nominal damages under the CVRA; (D) whether the trial court erred by reducing Huizar's damages under the IUCC; and (E) whether the trial court abused its discretion in assessing attorney's fees.

[4] We conclude that Horizon breached the peace and Huizar judicially admitted Horizon was not a debt collector under the FDCPA. The trial court did not err in determining Horizon was liable under the DCSA but also did not err by failing to award emotional distress damages under that provision. The trial court did not err by failing to grant nominal damages under the CVRA or by reducing Huizar's IUCC damages by the deficiency judgment. And as for attorney's fees, the trial court erred in awarding attorney's fees under the IUCC and CVRA but did not abuse its discretion in determining a reasonable hourly rate for attorney's fees under the DCSA. Accordingly, we affirm in part and reverse and remand in part.

Facts and Procedural History

[5] On January 12, 2018, Huizar purchased a 2015 Ford Explorer, financed through Horizon, for his fiancée, Jessica. By July 2018, Huizar had made only three out of the six payments that had come due on the vehicle. Horizon attempted to contact Huizar regarding his lack of payment on numerous occasions, but Huizar did not respond. On July 24, 2018, Horizon sent K.I.G. Recovery Service ("KIG") to repossess the vehicle and sometime after 10:00

p.m., KIG agents Ron Caputo and George Armond arrived at Huizar's home. When the agents arrived, they found the vehicle backed into the driveway.

[6] Caputo went to Huizar's front door and informed Huizar that he was there to repossess the vehicle because Huizar was behind on payments. Caputo then showed Huizar the contract as the basis for the repossession. Caputo testified that he could have just taken the vehicle without going to the door, but he was trying to allow Huizar to remove the personal property from the vehicle. *See* Transcript, Volume 2 at 149.

[7] While Caputo was talking to Huizar, Armond got into the driver's seat of the unlocked vehicle and locked the doors. Jessica came outside and tried to open the vehicle's doors, but Armond kept locking the doors and refused to let her enter. Huizar then told Caputo that the men needed to get off his property and that he was not letting them take the vehicle. *See id.* at 56.

[8] Caputo told Huizar that if he did not give up the keys to the vehicle, Caputo would get the police involved. Eventually, Huizar instructed Jessica to provide the keys to Caputo and Armond. Jessica then removed the personal property from the vehicle and Caputo and Armond left with the vehicle. After the incident, Huizar began to feel lightheaded and sweaty, and his hands began to shake badly.

[9] The next day Huizar contacted Horizon in an attempt to reach an agreement to catch up on payments; however, Horizon did not accept his offer and accelerated the loan, requiring full payment. After the repossession, the vehicle

was sold at auction for $16,000.00 leaving a deficiency of $7,679.08 on the loan amount. On September 26, 2018, Horizon sent correspondence to Huizar demanding payment of the deficiency balance.

[10] On November 22, 2018, Huizar filed a complaint against Horizon alleging that Horizon violated the DCSA, the IUCC, and the CVRA. Huizar later amended his complaint to include a FDCPA claim. Horizon filed a counterclaim against Huizar for the alleged deficiency remaining on the vehicle loan and sought attorney's fees. Following a bench trial, the trial court issued *sua sponte* findings of fact, conclusions of law, and judgment in favor of Huizar on all his claims, awarding damages for each and determining Huizar was entitled to attorney's fees in an amount to be determined.

[11] Horizon filed a Motion to Correct Error alleging in part that it was not a debt collector under the FDCPA and could not be liable under that statute. The trial court held a hearing on Horizon's motion, during which Huizar's counsel stated, "I'm advocating for my client still I believe now that Horizon is not a debt collector under the FDCPA[.]" *Id.* at 14. "I don't know what you want to do there because . . . they didn't put on that evidence . . . but what you'll find is that you can take away the FDCPA and still give Mr. Huizar complete relief[.]" *Id.*

[12] The trial court also held a hearing on Huizar's request for an award of attorney's fees. Huizar's attorney Duran Keller requested $400 an hour for approximately 185 hours of work on this case. Keller submitted his own

affidavit and multiple affidavits from other attorneys regarding the reasonableness of his rate.[1] *See* Exhibits, Volume 1 at 83-115.

[13] At the attorney's fee hearing, Zach Williams, a practicing attorney in Tippecanoe County, testified that he practices business and employment litigation, and that his highest rate is $300 an hour. Williams testified that he has co-counseled on many matters with Keller. Horizon presented the testimony of Jim Schrier, a commercial law attorney who has practiced for over thirty years in the Lafayette area. Schrier testified that his rate was $290 an hour and that he was unaware of any attorneys in the area charging $400 an hour.

[14] Subsequently, the trial court entered its Final Appealable Order on All Issues, granting Horizon's motion to correct error in part and denying Huizar's claims under the FDCPA. The trial court maintained its previous decisions regarding the DCSA, IUCC, and CVRA and awarded attorney's fees to Keller for a reduced number of hours at a reduced hourly rate. The trial court concluded in relevant part:

> Conclusions of Law
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> * * *
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> 5. *Horizon breached the peace*. . . . Huizar told Caputo that the Explorer was on his property and that he was not going to allow

[1] Keller also provided the United States Consumer Law Attorney Fee Survey Reports for 2015-16 and 2017-2018, but the trial court stated it gave them very little weight.

Caputo or Armond to take the vehicle. He stated this on multiple occasions, and told them to leave. Horizon was required to immediately desist and seek judicial relief. The failure to do so clearly constitutes an unlawful breach of the peace. Moreover, the Court is particularly troubled by Armond's actions, which included locking the doors and refusing to return personal property until the keys were provided. This behavior could have easily provoked an altercation and is exactly the type of behavior Indiana law aims to prevent. Armond's actions constitute an unlawful breach of the peace.

6. *Horizon is not a debt collector under the FDCPA*.[2] At the [motion to correct error] hearing . . . , Huizar conceded that Horizon's principal purpose was not the enforcement of security interests; therefore, Horizon cannot be a debt collector under the FDCPA.[3]

* * *

10. *Huizar is awarded statutory damages of $1,500.00, along with costs and fees, for violations of the DCSA*. Horizon is a supplier of automobile loans under the DCSA. . . . A supplier may not commit an unfair, abusive, or deceptive act, omission, or practice in connection with a consumer transaction. Ind. Code § 24-5-0.5-3(a). . . .

Horizon committed an unfair and abusive act by breaching the peace when repossessing the vehicle. . . . The DCSA does not

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[2] The trial court's original order found that Horizon violated the FDCPA and awarded Huizar $1,000 in statutory damages and $10,000 in actual damages plus attorney's fees and costs. Appellant's Appendix, Volume 2 at 21-24.

[3] Accordingly, Huizar's requests for statutory and actual damages and fees and costs under the FDCPA were denied.

expressly authorize the recovery of emotional damages. The fact that the [DCSA] allows for treble damages suggests that recovery is limited to pecuniary loss. Accordingly, the Court denies Huizar's request for emotional damages under the DCSA.

11. *Huizar is awarded statutory damages of $3,080.03, along with costs and fees, for violations of the IUCC*. If a secured party fails to act in a commercially reasonable manner, a court may restrain collection, enforcement or disposition of collateral on appropriate terms and conditions. Ind. Code § 26-1-9.1-625. . . .

The Court grants the request for statutory damages, but reduces the statutory damages by $7,679.08 because elimination of the deficiency judgment is part of Huizar's relief under the IUCC. Damages under the IUCC are those reasonably calculated to put an eligible claimant in the position that he would have occupied had no violation occurred. [Ind. Code] § 26-1-9.1-625, Comment 3. . . . The Court awards costs and fees as set forth below.

12. *Huizar's request for actual damages under the CVRA is denied*. . . .

Huizar has proven conversion by a preponderance of the evidence. [However,] Huizar does not seek damages for the brief conversion of personal property. Huizar seeks reimbursement for the cost to purchase a new vehicle for Jessica. However, Huizar was ninety days behind on payments and could not pay off the full balance once the loan was accelerated. Horizon was entitled to peaceful repossession. Once Huizar demanded they stop self-help measures, Horizon still could have lawfully sought judicial relief. An argument could be made that Huizar is entitled to the cost of alternative transportation during the time it would take to seek judicial relief, but the Court did not hear evidence in this regard and will not speculate on any such damages. The Court denies the request for reimbursement for the full cost of a new vehicle, which could be used long after any judicial proceedings

concluded. Huizar is entitled to costs and fees under the CVRA as set forth below.

* * *

16. *Horizon is ordered to pay $46,305.00 to Keller for attorney fees related to this litigation*. The Court awards fees at the rate of $300.00 per hour for 154.35 hours of work.

Appealed Order at 5-9 (footnote omitted). Horizon now appeals and Huizar cross-appeals. Additional facts will be provided as necessary.

Discussion and Decision[4]

I. Standard of Review

[15] According to the record before us, neither party filed a Trial Rule 52(A) written request with the trial court for special findings and conclusions thereon. We therefore treat the trial court's order as *sua sponte* findings of fact. *Estudillo v. Estudillo*, 956 N.E.2d 1084, 1089 (Ind. Ct. App. 2011). *Sua sponte* findings control only as to the issues they cover, and a general judgment standard will control as to the issues upon which there are no findings. *Yanoff v. Muncy*, 688

[4] Horizon has filed a motion to strike portions of Huizar's Cross-Appellant's Reply Brief, alleging Huizar improperly responded to arguments made in Horizon's original brief rather than just issues raised in Horizon's Cross-Appellee's Brief. Under Indiana Rule of Appellate Procedure 46(D)(4), a cross-appellant's reply brief "may only respond to that part of the appellant's reply brief addressing the appellee's cross-appeal." Accordingly, we grant the motion to strike by separate order and have not considered the improper portions of Huizar's Cross-Appellant's Reply Brief.

N.E.2d 1259, 1262 (Ind. 1997). We will affirm a general judgment entered with findings if it can be sustained on any legal theory supported by the evidence. *Id.*

[16] When a court has made special findings of fact, we review sufficiency of the evidence using a two-step process. *Id.* First, we must determine whether the evidence supports the trial court's findings of fact. *Id.* Findings will only be set aside if they are clearly erroneous. *Id.* Findings are clearly erroneous when there are no facts to support them either directly or by inference. *Bettencourt v. Ford*, 822 N.E.2d 989, 997 (Ind. Ct. App. 2005). Second, we must determine whether those findings of fact support the trial court's judgment. *Yanoff*, 688 N.E.2d at 1262. "We will not substitute our own judgment if any evidence or legitimate inferences support the trial court's judgment." *Baxendale v. Raich*, 878 N.E.2d 1252, 1257-58 (Ind. 2008).

[17] "[W]hile we defer substantially to findings of fact, we do not do so to conclusions of law." *McCauley v. Harris,* 928 N.E.2d 309, 313 (Ind. Ct. App. 2010) (citation omitted), *trans. denied*. "We evaluate questions of law de novo and owe no deference to a trial court's determination of such questions." *Id.* Statutory interpretation is a matter of law to be determined de novo by this court. *Pendleton v. Aguilar,* 827 N.E.2d 614, 619 (Ind. Ct. App. 2005), *trans. denied.*

II. Breach of the Peace

[18] Pursuant to Indiana Code section 26-1-9.1-609, after default a secured party may take possession of collateral "without judicial process, if it proceeds

without breach of the peace." However, "if the repossession is verbally or otherwise contested at the actual time of and in the immediate vicinity of the attempted repossession by the defaulting party or other person in control of the chattel, the secured party must desist and pursue his remedy in court." *Census Fed. Credit Union v. Wann*, 403 N.E.2d 348, 352 (Ind. Ct. App. 1980).

[19] Horizon argues that "through its independent contractor, KIG, [it] did not breach the peace during the repossession" of Huizar's vehicle. Appellant's Brief at 16. Horizon contends that "[w]ithout a breach of peace, Horizon is not liable to Huizar under the DCSA or the IUCC." *Id.* at 18. "A breach of the peace is a violation or disturbance of the public tranquility or order, and the offense includes breaking or disturbing the public peace by any riotous, forceful, or unlawful proceedings." *Wann*, 403 N.E.2d at 350. Further, "[t]he general rule is that the creditor cannot utilize force or threats, cannot enter the debtor's residence without consent, and cannot seize any property over the debtor's objections." *Birrell v. Ind. Auto Sales & Repair*, 698 N.E.2d 6, 8 (Ind. Ct. App. 1998) (citation omitted), *trans. denied*.

[20] Here, Huizar told Caputo that he and Armond needed to get off his property and that he was not letting them take the vehicle. *See* Tr., Vol. 2 at 56. However, Horizon contends that "[a]ny initial objection to the repossession was waived when Huizar voluntarily surrendered the keys to the vehicle." Appellant's Br. at 18. Horizon further argues that "KIG did not continue the repossession of the vehicle once the objection was lodged and did not resume until Huizar consensually surrendered the keys." *Id.* Horizon conveniently

omits that during this apparent period of "suspended repossession," a KIG employee had locked himself inside the vehicle and refused to exit until Huizar produced the keys.

[21] In *Wann*, we cited favorably *Deavers v. Standridge*, 242 S.E.2d 331 (Ga. Ct. App. 1978), a Georgia case in which the court held that blocking the movement of the defaulting debtor's automobile after his oral protest to the secured party's repossession attempt was a breach of the peace. *Wann*, 403 N.E.2d at 351. We find the case at hand to be analogous to *Deavers*. KIG's refusal to desist after Huizar objected to the repossession coupled with a KIG employee locking himself inside the vehicle until the keys were produced was a "disturbance of the public tranquility or order." *Id.* at 350. Therefore, we conclude the trial court did not abuse its discretion in determining that KIG's conduct constituted a breach of the peace.[5]

III. Fair Debt Collection Practices Act

[22] Under the FDCPA, "a debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt[.]" 15 U.S.C. § 1692f. "Unfair or unconscionable means" include taking or threatening to take any nonjudicial action to effect dispossession of property if:

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[5] "A person who has delegated the duties of a secured party but who remains obligated to perform them is liable under this subsection." Ind. Code § 26-1-9.1-625, cmt. 3. Therefore, Horizon is liable for KIG's conduct.

> (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;
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> (B) there is no present intention to take possession of the property; or
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> (C) the property is exempt by law from such dispossession or disablement.

15 U.S.C. § 1692f(6). The term debt collector means:

> any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. . . . For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the *principal purpose of which is the enforcement of security interests*.

15 U.S.C. § 1692a(6) (emphasis added).

[23] The trial court originally granted judgment for Huizar on his FDCPA claim. Horizon filed a motion to correct error alleging in part that the judgment was in error because Horizon was not a debt collector. After hearing counsels' arguments on Horizon's motion to correct error, the trial court found that "Huizar conceded that Horizon's principal purpose was not the enforcement of security interests; therefore, Horizon cannot be a debt collector under the FDCPA." Appealed Order at 6. Huizar argues that he did not judicially admit that Horizon was not a debt collector under the FDCPA.

[24] A judicial admission "is an admission in a current pleading or made during the course of trial; it is conclusive upon the party making it and relieves the opposing party of the duty to present evidence on that issue." *Weinberger v. Boyer,* 956 N.E.2d 1095, 1105 (Ind. Ct. App. 2011), *trans. denied.* If counsel makes a clear and unequivocal admission of fact, he or she has made a judicial admission that is binding upon his or her client. *Luphahla v. Marion Cnty. Sheriff's Dep't*, 868 N.E.2d 1155, 1159 (Ind. Ct. App. 2007). Unlike evidentiary admissions which the trier of fact may accept or reject, judicial admissions are conclusive and binding on the trier of fact. *Stewart v. Alunday*, 53 N.E.3d 562, 568 (Ind. Ct. App. 2016). Judicial admissions are "voluntary and knowing" concessions and statements that contain "ambiguities or doubt" are not binding as judicial admissions. *Harr v. Hayes*, 106 N.E.3d 515, 526-27 (Ind. Ct. App. 2018).

[25] At the hearing on Horizon's Motion to Correct Error, Huizar's attorney stated: "[Y]ou know judge I'm advocating for my client still I believe now that Horizon is not a debt collector under the FDCPA. . . ." Tr., Vol. 3 at 14. In determining whether counsel's statements constitute a judicial admission, "[w]e decline to cherry pick a particular statement by counsel to the exclusion of other statements." *Vigus v. Dinner Theater of Ind., L.P.*, 153 N.E.3d 1150, 1158 (Ind. Ct. App. 2020), *trans. denied.* And where there is ambiguity or doubt in a statement it is presumed that the party or its attorney did not intend to make an admission. *Id.*

[26] Huizar's counsel's admission that Horizon is not a debt collector is unambiguous and is not the only statement he made admitting the FDCPA is inapplicable. During a deposition, agents representing Horizon stated that its principal purpose was the enforcement of security interests, *see* Appellee's Appendix, Volume 2 at 115; however, when discussing this statement at the hearing on the Motion to Correct Error, Huizar's attorney states:

> [Y]ou asked a question judge about one of the questions being asked was the principal purpose of [Horizon's business] being the enforcement of security interests. . . . It sounds like there could have been evidence that Horizon's principal purpose was not the enforcement of security interests. There wasn't. We kind of relied on the fact that they made this statement but at this point you know the main event my client won and that was the biggest thing. Procedurally I don't know how that goes, I don't know if they're stuck with the testimony because they testified that way. I don't care for a gotcha, *you can take away the FDCPA* because even though I think under [T]rial [R]ule 59 they would have had to meet the standard of attaching an affidavit on a motion to correct error to state you know something like despite due diligence here is the actual evidence and we didn't actually know our principal purpose. . . . It's probably the case as I understand it now. So, you can take that away . . . and regardless of the FDCPA he still prevails.

Tr., Vol. 3 at 4-5.

[27] We conclude Huizar's attorney's statements were knowing and voluntary concessions; therefore, the trial court did not err in determining Huizar judicially admitted Horizon was not a debt collector under the FDCPA and modifying its original order to deny Huizar's FDCPA claim.

IV. Deceptive Consumer Sales Act

[28] Horizon argues that because the trial court determined that Huizar judicially admitted Horizon was not a debt collector under the FDCPA, Horizon is not liable under the DCSA. The DCSA is a remedial statute and it "shall be liberally construed and applied to promote its purposes and polices[,]" Ind. Code § 24-5-0.5-1(a), one of which is to protect consumers from suppliers who commit unconscionable sales acts, Ind. Code § 24-5-0.5-1(b).

[29] Under the DCSA, "[a] *supplier* may not commit an unfair, abusive, or deceptive act, omission, or practice in connection with a *consumer transaction*." Ind. Code § 24-5-0.5-3(a) (emphasis added). A "consumer transaction" means "a sale, lease, assignment, award by chance, or other disposition of an item of personal property, real property, a service, or an intangible" and includes the "collection of or attempt to collect a debt by a debt collector." Ind. Code § 24-5-0.5-2(a)(1). "Supplier" under the DCSA means:

> (A) A seller, lessor, assignor, or other person who regularly engages in or solicits consumer transactions, including soliciting a consumer transaction by using a telephone facsimile machine to transmit an unsolicited advertisement. The term includes a manufacturer, wholesaler, or retailer, whether or not the person deals directly with the consumer.
>
> (B) A debt collector.

Ind. Code § 24-5-0.5-2(a)(3). Debt collector under the DCSA "has the meaning set forth in 15 U.S.C. § 1692(a)(5)." Ind. Code § 24-5-0.5-2(13).

[30] Horizon contends that because the trial court found that Huizar failed to prove that Horizon made any implicit or explicit misrepresentations in violation of the DCSA and because the trial court found it was not a debt collector under the FDCPA, it cannot be held liable under the DCSA. Huizar argues that Horizon is a supplier under the DCSA independent of the FDCPA and that "Horizon regularly engages in and solicits consumer transactions, including vehicle financing to consumers." Amended Appellee's Brief and Cross-Appeal ("Appellee's Br.") at 20.

[31] In *Wagoner v. NPAS, Inc.*, the federal court determined that because the plaintiff had not established the defendant as "a debt collector under the FDCPA, she likewise cannot do so under the [DCSA]." 456 F.Supp.3d 1030, 1045 (N.D. Ind. 2020). However, we differentiate this case from *Wagoner*. In *Wagoner*, the plaintiff's DCSA claim was based solely on a violation of the FDCPA. *See id.* at 1034. Here, Huizar's pleaded facts claiming Horizon's conduct constituted a violation of the DCSA apart from a FDCPA violation. *See* Appellee's App., Vol. 2 at 55-56.

[32] Horizon serviced Huizar's automobile loan after Huizar purchased the vehicle from Auto Express which constituted a consumer transaction. *See* Ind. Code § 24-5-0.5-2(a)(1) (a consumer transaction means "a sale, lease, assignment, award by chance, or other disposition of an item of personal property, real property, a service, or an intangible"). Therefore, Horizon would be considered a supplier as an "other person who regularly engages in or solicits consumer transactions." Ind. Code § 24-5-0.5-2(a)(3). Further, while breaching the peace

is a violation of the FDCPA, the KIG agents' refusal to leave the residence after being asked and locking themselves in the car until the keys were provided also constitute unfair and abusive acts. *See* Indiana Code § 24-5-0.5-3(a) (stating an unfair or abusive act "is a violation of [DCSA] whether it occurs before, during, or after the transaction."). We conclude that Huizar's DCSA claim can stand independently of his failed FDCPA claim, and the trial court did not err by finding Horizon violated the DCSA.

V. Damages

A. Crime Victims Relief Act

[33] The trial court denied Huizar's request for damages but awarded Huizar costs and fees under the CVRA. *See* Appealed Order at 7-8. Under the CVRA, a person who suffers a pecuniary loss as a result of a violation of Indiana Code article 35-43 may bring a civil action. Ind. Code § 34-24-3-1.[6] A successful CVRA claimant may recover treble damages, costs, and attorney's fees. *See id.* Huizar argues that the trial court "should have found at least nominal damages under the [CVRA]."[7] Appellee's Br. at 32.

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[6] Under Indiana Code section 35-43-4-3, "[a] person who knowingly or intentionally exerts unauthorized control over property of another person commits criminal conversion[.]"

[7] In his complaint, Huizar alleged "Plaintiff suffered a loss as a result of [Defendant] knowingly or intentionally exerting unauthorized control over the Vehicle." Appellee's App., Vol. 2 at 34. The trial court denied Huizar's request for "reimbursement for the cost to purchase a new vehicle" because Horizon could have lawfully sought judicial relief due to Huizar being behind on payments. Appealed Order at 8. To the extent Huizar argues that the trial court should have awarded him $2,500, the full price of the new vehicle he purchased, he fails to present case law or a cogent argument for this contention and it is therefore waived. *See*

[34] Huizar cites multiple cases establishing that nominal damages are generally available in replevin actions. *See Romanowski v. Giordano Mgmt. Grp., LLC*, 896 N.E.2d 558, 562 (Ind. Ct. App. 2008) ("[D]amages for wrongful detention . . . may still be recovered in a replevin action . . . [and] once a wrongful detention is established, at least nominal damages may be awarded."); *Lou Leventhal Auto Co. v. Munns*, 164 Ind. App. 368, 377-78, 328 N.E.2d 734, 741 (1975) (same). However, he presents no case law showing nominal damages are available or required under the CVRA. Although it is clear Huizar's argument for nominal damages is an attempt to become eligible for attorney's fees under the CVRA, he has failed to state an independent reason for them to be awarded. Therefore, we conclude the trial court did not abuse its discretion by failing to award Huizar nominal damages under the CVRA[8].

B. Indiana Uniform Commercial Code

[35] The trial court concluded that by breaching the peace Horizon failed to act in a commercially reasonable manner during the collection process and violated the IUCC. However, the trial court also determined that Horizon's "sale by auction

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Indiana Appellate Rule 46(8)(a). We note that we do not believe that the cost of a new vehicle would be the correct measure of damages in this situation. The trial court also determined that Huizar did not seek damages for the brief conversion of personal property. Appealed Order at 8.

[8] Generally, even if "appellant was entitled to nominal damages, this court will not reverse for such reason." *Gewartowski v. Tomal*, 125 Ind. App. 481, 486, 123 N.E.2d 580, 582 (1955); *see also Large v. Gregory*, 417 N.E.2d 1160, 1163 (Ind. Ct. App. 1981) ("[T]he trial court's failure to assess nominal damages does not warrant reversal.").

was conducted in a commercially reasonable manner and accepts the deficiency amount" of $7,679.08. Appealed Order at 7 n.1.

[36] Under Indiana Code section 26-1-9.1-625(b), "a person is liable for damages in the amount of any loss caused by a failure to comply" with the IUCC. If the collateral is consumer goods, the debtor may recover an amount not less than "the credit service charge plus ten percent (10%) of the principal amount of the obligation or the time-price differential plus ten percent (10%) of the cash price." Ind. Code § 26-1-9.1-625(c)(2). Under this section, the trial court calculated the following damages:

Ten percent of amount financed:	$22,767.93 x .10	$2,276.79
Finance charge		$8,482.32
		==========
		$10,759.11

Appealed Order at 7. However, the trial court reduced this amount by $7,679.08 "because elimination of the deficiency judgment is part of Huizar's relief under the IUCC[,]" and awarded Huizar $3,080.03. *Id.* (footnote omitted).

[37] Huizar argues that the trial court erred by reducing his damages under the IUCC by Horizon's deficiency judgment because Horizon "did not prove its burden to be entitled to the deficiency." Appellee's Br. at 34. When a secured party's compliance is placed at issue, the secured party has the burden of establishing that the disposition was proper. Ind. Code § 26-1-9.1-626(2).

[38] Under the IUCC, a disposition of collateral is made in a commercially reasonable manner if it is made:

> (1) in the usual manner on any recognized market;
>
> (2) at the price current in any recognized market at the time of the disposition; or
>
> (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

Ind. Code § 26-1-9.1-627(b). "The fact that a greater amount could have been obtained . . . is not of itself sufficient to preclude the secured party from establishing" that the disposition was commercially reasonable. Ind. Code § 26-1-9.1-627(a).

[39] Here, the vehicle was sold at the Greater Kalamazoo Auto Auction for $16,000. Ex., Vol. 1 at 81. Gil Romero, a Horizon employee, testified that he has attended the auction twice a month for twenty-six years and he determines whether an auction price will be accepted.[9] *See* Tr., Vol. 2 at 131.

[40] If the collateral is sold in the usual manner in a recognized market for those goods, then the sale is presumed to be proper. *Hall v. Owen Cnty. State Bank*, 175

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[9] The vehicle was sold to Harold Zeigler Ford. Romero did not testify regarding the number of bids made on the vehicle. *See* Tr., Vol. 3 at 130-33. However, this is not significant as "we would not hold sales invalid as matter of law where only 1 or 2 bids were received[.]" *Hall v. Owen Cnty. State Bank*, 175 Ind. App. 150, 166, 370 N.E.2d 918, 930 (1977).

Ind. App. 150, 163, 370 N.E.2d 918, 929 (1977). In "most cases a sale or disposal of collateral to a dealer or on a wholesale market or auction will be commercially reasonable[.]" *Id.* Here, the record establishes that the vehicle was sold at auction, and there is no evidence that Horizon executed the sale in bad faith. *Cf. Walker v. McTague*, 737 N.E.2d 404, 410-11 (Ind. Ct. App. 2000) (affirming the trial court's conclusion that a sale was not conducted in a commercially reasonable manner where the defendants conducted a sale without notice and sold the collateral to themselves at a drastically reduced price), *trans. denied*. Therefore, we conclude that the trial court did not abuse its discretion by determining that the deficiency judgment was commercially reasonable.

[41] Huizar also contends that the IUCC's "minimum statutory damages pursuant to Ind. Code § 26-1-9.1-625(c)(2)" cannot be reduced. Appellee's Br. at 36. "Damages for violation of the requirements of [the IUCC] are those reasonably calculated to put an eligible claimant in the position that it would have occupied had no violation occurred." Ind. Code § 26-1-9.1-625, cmt. 3. Further, a secured party is not liable under section 625(c)(2) more than once with respect to any one secured obligation. Ind. Code § 26-1-9.1-628(e). In *Hall*, this court stated that when a debtor is provided a remedy, "we see no reason to attach a further penalty to the creditor by declaring an automatic forfeiture of his right of a deficiency judgment." 175 Ind. App. at 162, 370 N.E.2d at 928. Eliminating the deficiency judgment *and* granting damages pursuant to section 625(c)(2) would both be forms of relief for Huizar. We conclude that the trial court did

not err by reducing Huizar's section 625(c)(2) damages by the deficiency judgment.

C. Emotional Distress

[42] The trial court found that "[t]he fact that the [DCSA] allows for treble damages suggests that recovery is limited to pecuniary loss." Appealed Order at 6. Huizar argues that he "is entitled to emotional distress damages under the [DCSA]." Appellee's Br. at 26. Under the DCSA, "[a] person relying upon an uncured or incurable deceptive act may bring an action for the damages *actually suffered* as a consumer as a result of the deceptive act[.]" Ind. Code § 24-5-0.5-4(a) (emphasis added). However, "the recovery must be limited to those damages which were the proximate result of the deceptive act." *Captain & Co., Inc. v. Stenberg*, 505 N.E.2d 88, 98 (Ind. Ct. App. 1987), *trans. denied*.

[43] In *Stenberg,* the plaintiff raised, in part, a DCSA claim and a fraud claim. *Id.* at 91. Generally, "damages for emotional distress may not be recovered in the absence of physical injury." *Id.* at 100. However, we held that because the plaintiff could "recover under a fraud theory[,]" physical injury was not required. *Id.* Similarly, in *Cullison v. Medley*, our supreme court held that the "impact rule" does not prohibit recovery for emotional distress when sustained in the course of a tortious trespass. 570 N.E.2d 27, 30 (Ind. 1991). Huizar argues that *Stenberg* and *Cullison* establish emotional distress damages as recoverable; however, Huizar has not raised a fraud or trespass claim. We need

only determine whether emotional distress damages are available to Huizar under the DCSA as "damages actually suffered[.]" Ind. Code § 24-5-0.5-4(a).

[44] In *McCormick Piano & Organ Co., Inc. v. Geiger*, we found that damages for emotional distress were not recoverable under the DCSA absent a showing of physical injury. 412 N.E.2d 842, 852 (Ind. Ct. App. 1980). However, Indiana has since adopted the "modified impact rule[.]" *Atl. Coast Airlines v. Cook*, 857 N.E.2d 989, 996 (Ind. 2006). Under the modified impact rule, physical injury is no longer necessary; however, the new rule "maintains the requirement of a direct physical impact." *Id.* Huizar has presented no evidence that he experienced a direct physical impact because of KIG's conduct during the repossession. Therefore, we conclude that Huizar cannot recover emotional distress damages under the DCSA.

VI. Attorney's Fees

A. Granting of Attorney's Fees

[45] It is well settled that each party to litigation is responsible for his or her own attorney's fees absent statutory authority, agreement, or rule to the contrary. *Crowl v. Berryhill,* 678 N.E.2d 828, 831 (Ind. Ct. App. 1997). Horizon argues that the trial court erred in awarding Huizar attorney's fees under the IUCC and CVRA. Conversely, Huizar contends that "[t]he Trial Court did not Order Attorney Fees Under IUCC but was permitted to do so under CVRA." Appellee's Br. at 20. However, the trial court awarded "costs and fees" under

both the IUCC and CVRA. *See* Appealed Order at 7-8. Therefore, we will address attorney's fees under both statutes.

[46] IUCC chapter 9.1 governs secured transactions. *See* Ind. Code § 26-1-9.1-101. Attorney's fees are not expressly provided for in the chapter. *See* Ind. Code § 26-1-9.1-625. Further, there is no case law establishing attorney's fees under chapter 9.1. However, this court has held that attorney's fees are not recoverable under IUCC chapter 2. *See Ind. Glass Co. v. Ind. Mich. Power Co.*, 692 N.E.2d 886, 889 (Ind. Ct. App. 1998).

[47] Indiana Code section 26-1-2-714 provides for incidental and consequential damages. The chapter defines incidental and consequential damages as follows:

> (1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.
>
> (2) Consequential damages resulting from the seller's breach include[:]
>
> (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
>
> (b) injury to person or property proximately resulting from any breach of warranty.

Ind. Code § 26-1-2-715. In *Ind. Glass Co.*, we stated that:

> Section 2-715 does not explicitly provide for the recovery of attorney's fees as incidental or consequential damages and, thus, that section was not intended to abrogate the common law in Indiana regarding the recovery of attorney's fees.

Id. at 889. Indiana Code section 26-1-9.1-625 provides remedies for IUCC chapter 9.1. As previously stated, attorney's fees are not explicitly provided for under the section. *See* Ind. Code § 26-1-9.1-625. Therefore, consistent with the decision in *Ind. Glass Co.*, we conclude attorney's fees were not contemplated by the section and are not recoverable under IUCC chapter 9.1.

[48] Under the CVRA, if a person "suffers a pecuniary loss as a result of a violation of [Indiana Code article 35-43], the person may bring a civil action against the person who caused the loss" and request "reasonable attorney's fees." Ind. Code § 34-24-3-1.[10] However, this court has held that if a plaintiff suffers no pecuniary loss as a result of a defendant's actions, the plaintiff is not entitled to recover attorney's fees under the CVRA. *Coleman v. Coleman*, 949 N.E.2d 860, 869 (Ind. Ct. App. 2011). In *Coleman,* we explained:

> The statute explicitly refers to "pecuniary loss" as the necessary prerequisite for an award of attorney fees. It does not state that any "victim" of one of the enumerated crimes is entitled to attorney fees. If the legislature had intended the statute to have

[10] The trial court found Huizar's actions constituted criminal conversion, *see* Appealed Order at 7-8, which is included in Indiana Code article 35-43.

> that broad of an application, it could have worded the statute differently.

Id. (footnote omitted).

[49] Here, the trial court did not award Huizar pecuniary damages under the CVRA. Further, as determined above, the trial court did not err by failing to award Huizar nominal damages under the CVRA. *See supra* ¶ 34. Therefore, Huizar is not entitled to attorney's fees under the CVRA.

[50] Although Huizar is not afforded attorney's fees under the IUCC and CVRA, it is undisputed that attorney's fees are available to him under the DCSA. *See* Ind. Code § 24-5-0.5-4(a) ("[T]he court may award reasonable attorney fees to the party that prevails in an action under this subsection."). In awarding attorney's fees, the trial court determined that Keller spent 154.35 hours on this case.[11] *See* Appealed Order at 9. We reverse and remand with instructions that the trial court award attorney's fees only for hours attributable to Huizar's DCSA claim, specifically Huizar's claim that Horizon breached the peace.[12]

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[11] The trial court arrived at this figure by deducting the 20 hours attributable to the FDCPA claim and the 10.82 hours Keller spent on his claim for attorney's fees from the 185.17 total hours spent on the case.

[12] We note that whether Horizon breached the peace was also the crux of Huizar's IUCC claim. Thus, hours attributable to the IUCC and DCSA claims may not be discernible.

B. Calculation of Attorney's Fees

[51] Huizar argues that the trial court abused its discretion in assessing attorney's fees by reducing his requested hourly rate. *See* Appellee's Br. at 38. The trial court has broad discretion in assessing attorney's fees, and reversal is warranted only when the trial court's award is clearly against the logic and effect of the facts and circumstances before the court. *In re Marriage of Tearman,* 617 N.E.2d 974, 978 (Ind. Ct. App. 1993). Further, the trial judge possesses personal expertise that he or she may use when determining reasonable attorney's fees. *Bower v. Bower,* 697 N.E.2d 110, 115 (Ind. Ct. App. 1998).

[52] The Indiana Rules of Professional Conduct set out a number of factors that can be utilized to determine a reasonable fee, including "the fee customarily charged in the locality for similar legal services[.]" Ind. Professional Conduct Rule 1.5(a)(3). Generally, the "burden of proving the market rate is on the party seeking the fee award. However, once an attorney provides evidence establishing his market rate, the opposing party has the burden of demonstrating why a lower rate should be awarded." *Barker v. City of W. Lafayette*, 894 N.E.2d 1004, 1011 (Ind. Ct. App. 2008) (citation omitted), *trans. denied.*

[53] Huizar contends that he presented significant evidence in support of Keller's requested rate, $400 per hour, and that Horizon "provided no evidence of what

a reasonable rate is for the work completed."[13] Appellee's Br. at 39. However, Horizon called as a witness Schrier, a commercial law attorney who has practiced for over thirty years in the Lafayette area. Schrier testified that his rate was $290 an hour and that he was unaware of any attorneys in the area charging $400 an hour. Further, Huizar's witness Williams, an attorney who practices business litigation in Tippecanoe County and has co-counseled "on many matters" with Keller, testified that his highest rate is $300 an hour. Tr., Vol. 3 at 61.

[54] Therefore, there was evidence before the trial court to support the reasonableness of the hourly rate used in the court's lodestar calculation. Further, the trial court made findings on and weighed each of the factors enumerated in Rule of Professional Conduct 1.5. We conclude the trial court did not abuse its discretion in its assessment of attorney's fees.

Conclusion

[55] We conclude that Horizon breached the peace and Huizar judicially admitted Horizon was not a debt collector under the FDCPA. The trial court did not err in determining Horizon was liable under the DCSA but also did not err by failing to award emotional distress damages under that provision. The trial

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[13] Huizar's attorney's fees were calculated under the lodestar method. The lodestar figure is the product of a reasonable number of hours spent on the litigation times a reasonable hourly rate. *Barker v. City of W. Lafayette*, 878 N.E.2d 230, 233 (Ind. Ct. App. 2007). A reasonable hourly rate is based on market rates in the community for similar service rendered. *Id.*

court did not err by failing to grant nominal damages under the CVRA or by reducing Huizar's IUCC damages by the deficiency judgment. And as for attorney's fees, the trial court erred in awarding attorney's fees under the IUCC and CVRA but did not abuse its discretion in determining a reasonable hourly rate for attorney's fees under the DCSA. Accordingly, we affirm in part and reverse and remand in part with instructions to the trial court to recalculate attorney's fees consistent with this opinion.

[56] Affirmed in part, reversed and remanded in part.

Bradford, C.J., Altice, J., concur.