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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2003-CA-001644-MR

MARTA HENSLEY AND
TERRY HENSLEY — APPELLANTS

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE PHILIP R. PATTON, SPECIAL JUDGE
ACTION NO. 99-CI-01380

BANK ONE, KENTUCKY, NA; AND
KENTUCKY AUTO RECOVERY
SERVICES, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; JOHNSON, JUDGE; MILLER, SENIOR JUDGE.[1]

COMBS, CHIEF JUDGE: Marta and Terry Hensley appeal from the trial order and judgment of the Warren Circuit Court in favor of Bank One, Kentucky, NA (Bank One, or "the bank"), and Kentucky

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Auto Recovery Service, Inc. (Kentucky Auto), following a jury trial on their claim of wrongful repossession. The Hensleys contend that the trial court made several evidentiary errors that deprived them of a fair trial. They also argue that their rights to due process were impaired by the hiatus of four years between the filing of their complaint and the trial. After a careful review of the record, including the video recording of the trial conducted by the Special Judge, Hon. Phillip R. Patton, we have found no error. Thus, we affirm.

On May 9, 1997, Marta Hensley purchased a 1997 Dodge Ram pick-up truck from Martin Automotive in Bowling Green, Kentucky. The cost of the truck according to the purchase agreement was $41,000. That figure was adjusted by the deducting of the Hensleys' down payment of $5,000, the addition of the cost of credit health and disability insurance, and the addition of taxes and other fees -- leaving a balance of $43,802.55. In order to finance the sale, Marta entered into a personal loan agreement with Bank One and gave the bank a security interest in the vehicle. According to the agreement, she was obligated to repay Bank One in installments of $968.68 over the span of 66 months -- beginning August 7, 1997.

Before Marta's first payment became due, she became ill with a thyroid tumor. She filed a claim with her disability insurer, Protective Life Insurance Company (Protective Life),

for payment of her installment loan. Protective Life began making monthly payments of $750, beginning with the August 1997 payment.

In January 1998, Marta discovered that Protective Life was paying $220 less than the amount due -– resulting in an arrearage of $1,100. Thus, she made two payments that month ($600 and $500) to make the account current. However, she did not continue to make regular payments of the difference of $220. By April 1999, she was again in arrears on the loan -– this time in the amount of $1,800. Bank One then decided to repossess the vehicle.

On April 25, 1999, the bank dispatched Kentucky Auto, a company located in Louisville, to repossess the truck. After satisfying the deficiency owed to the bank and paying additional sums required by the bank to continue the loan, the Hensleys recovered their truck from Kentucky Auto a few days later. Upon returning home, the Hensleys discovered that many items of personalty were missing from the truck, including a cell phone, numerous cassette tapes, ammunition, and a bag containing $3,600 in cash. In addition, the truck had been damaged in the course of the repossession.

On October 27, 1999, Marta filed a complaint against Bank One and Kentucky Auto. She claimed that the truck had been wrongfully repossessed; that she was less than one month in

arrears at the time of the repossession; and that the bank had not informed her that she had to pay on the due date to avoid repossession. She sought compensation for the damages allegedly resulting to the truck during the repossession and for the items lost from the truck. She also claimed punitive damages and attorney's fees. Because many of the items missing from the truck belonged to her husband, Marta was permitted to amend her complaint to add Terry Hensley as a plaintiff.

Although the Hensleys' complaint and amended complaint did not assert any claims against the dealership, Martin Automotive, they nonetheless made several allegations of wrongdoing against it during the discovery process. They complained that Terry had not been allowed to accompany Marta when she executed the sales contract and completed the application for the installment loan. They also claimed that Marta signed those documents under duress, generally alleging that the dealership took advantage of the fact that Marta was a "shy person" of foreign descent who was unskilled at "dealing with [a] pushy auto salesman." (Record, p. 776.)

Prior to trial, Bank One filed a motion *in limine* to prohibit the introduction of evidence relating to the Hensleys' contract with Martin Automotive. On August 13, 2001, the court granted the motion and admonished the Hensleys not to make any reference at trial as to: their negotiations with Martin

Automotive for the purchase of the truck, the conduct of the dealership's employees, and any dealings with Martin Automotive that occurred after the purchase of the vehicle.

The trial was continued three times pursuant to motions made by Kentucky Auto. The Hensleys did not object to these motions. The trial did not begin until May 13, 2003 – twenty-one months after the court had ruled on Bank One's motion *in limine*.

The Hensleys' theory of the case changed several times throughout the litigation. At a pre-trial hearing in January, 2001, their attorney stated that all the payments made by the Hensleys appeared to have been accounted for in the loan history provided by Bank One during discovery. However, on the day before trial, the Hensleys alleged for the first time that they had made a second payment of $5,000 the week following the purchase that was never credited to their account. The trial court excluded evidence of the additional payment of $5,000, and the Hensleys argue on appeal that it erred in so doing.

The Hensleys also alleged (again for the first time at trial) that they sent a payment of $2,500 to Bank One in December 1997. This payment was not reflected in the bank's loan history nor was it credited against the loan. Although their testimony concerning this payment was admitted into

evidence, the Hensleys had no receipt or cancelled check to support their claim that they had paid this money to the bank.

At the conclusion of the Hensleys' proof, the trial court granted Kentucky Auto's motion for a directed verdict in part, concluding that the repossession of the truck had been accomplished without a breach of the peace. The jury later found: (1) that the Hensleys were in default on the loan with Bank One at the time of the repossession and (2) that Kentucky Auto had exercised ordinary care in protecting the vehicle while it was in its possession. A judgment consistent with the verdict was entered on May 23, 2003. The Hensleys filed a motion to alter, amend, or set aside the trial order and judgment, which was denied. This appeal followed.

The Hensleys' first two arguments involve the ruling of the trial court that prevented them from introducing evidence of an additional payment of $5,000 to Martin Automotive within a few days of the vehicle's purchase. The Hensleys testified that the $5,000 down payment for the truck was paid in cash on May 9, 1997. Terry Hensley testified by avowal that a representative of the bank came to his business a few days after the purchase and demanded that they pay an additional $5,000 toward the loan. He testified that he complied with the bank's request. As evidence of this additional payment, the appellants presented

two cancelled checks for $2,500, each payable to Martin Automotive, dated May 12, 1997.

The bank made discovery requests early in the litigation to obtain information from the appellants concerning payments made by them -- or by others on their behalf -- that were not credited against the loan. However, the second $5,000 payment was not revealed until May 12, 2003 -- literally the eve of trial. Because the checks were paid to Martin Automotive rather than to Bank One, Special Judge Patton ruled consistently with the court's prior decision on the bank's motion *in limine* and refused to allow the jury to hear evidence concerning the payment.

The Hensleys argue that the court abused its discretion in denying them the opportunity to establish that they were not in default. They also contend that the court abused its discretion in allowing Bank One to introduce a payment history that did not include the additional $5,000 paid to Martin Automotive.

"The presentation of evidence . . . rests in the sound discretion of the trial judge." Moore v. Commonwealth, Ky., 771 S.W.2d 34 (1988). Therefore, our standard of review of an evidentiary ruling of a trial court is abuse of discretion. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by

sound legal principles." Goodyear Tire and Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 581 (2001). In this case, we cannot conclude that the court abused its discretion in its ruling on this payment.

The payment at issue (consisting of the two checks for $2,500 each) was not made to the bank but rather to Martin Automotive. The checks were not negotiated by Bank One. The Hensleys offered no evidence of why Martin Automotive demanded this money. (We note that the alleged payment of the first $5,000 as the down payment had been made in cash.) There was no proof that the sum was used to offset any amounts that the Hensleys owed to the bank.

If the checks been made payable to Bank One, or if they had been negotiated by Bank One, they would constitute relevant evidence as to Marta's default. However, because there was no evidence that the alleged payment was ever associated with or received by Bank One, it was not relevant to any issue before the jury. Thus, the trial court did not err in excluding the checks along with Terry's testimony concerning the payment.

The Hensleys next argue that the trial court abused its discretion in refusing to allow them to read the deposition of Richard Thomas to the jury. Thomas, an employee of Bank One, was in charge of the indirect loan department at the time of

Marta's purchase of the truck. His job consisted of soliciting business from third parties -- such as car dealers.

Thomas had no knowledge of Marta's loan with the bank. However, the Hensleys sought to offer Thomas's testimony in order to establish that Martin Automotive was the agent of Bank One in order to render Bank One accountable for the alleged misconduct of Martin Automotive during the purchase negotiations. They contend that Thomas's testimony was relevant and necessary to establish that Marta was fraudulently induced to purchase the 1997 pick-up truck.

Nevertheless, as we have observed earlier, the Hensleys did not sue Martin Automotive -- nor did they attempt to rescind the purchase agreement. Their claims of fraudulent inducement and duress were never set forth either in their original complaint or in their amended complaint. Their only claim was for wrongful repossession, a claim which required proof that Marta was not in default at the time of the repossession.

Thomas's testimony related to the role of Martin Automotive as the bank's agent for the limited purpose of processing the paper work associated with the financing of the vehicle. This limited agency would not have entitled the Hensleys to a judgment against the bank for any tortious conduct of Martin Automotive. Thomas's testimony did not create a nexus

between the alleged hard-sell tactics of Martin Automotive and the bank. There was no indication that the dealership's sales techniques were of any benefit to Bank One or even that the bank had any knowledge of such conduct. Thomas's deposition did not have any bearing on the critical issue of whether Marta was in default on her loan. Consequently, the court did not abuse its discretion in excluding this testimony.

The Hensleys also contend that Kentucky Auto was liable as a matter of law for the damages that they claimed to have sustained in the course of the repossession with respect to missing articles. Whether these losses were attributable to the actions of Kentucky Auto was a matter properly submitted to the jury for resolution. As the finder of fact, the jury was not required to believe the Hensleys' account of events. Therefore, the trial court did not err in refraining from directing a verdict on Kentucky Auto's liability for the damages to the vehicle and for the lost items of property. Rainbo Baking Co. v. S & S Trucking Co., Ky., 459 S.W.2d 155 (1970).

The Hensleys contend that the trial court also erred in denying their motion for a mistrial because of a conversation that occurred during a recess between Bank One's attorney and four jurors. The contact was witnessed by the Hensleys' attorney, who reported the incident to the court. Bank One's counsel acknowledged that she had said "hello" to a "couple of

the jurors" and that she had remarked to a group of jurors that an approaching storm was visible through a window in the courthouse.

In response to the motion for a mistrial, both Bank One and Kentucky Auto requested that the court conduct a *voir dire* of the jurors involved. The Hensleys objected. The trial court denied the motion for mistrial and postponed any questioning of the panel until after a verdict was returned. At the conclusion of the trial, the jurors acknowledged that counsel's comments had not concerned anything other than the weather.

City of Catlettsburg v. Sutherland's Adm'r., Ky., 57 S.W.2d 512 (1933), cited by the appellants, is not factually congruent with the instant case. In City of Catlettsburg, a short conversation (10 to 15 minutes) took place between the widow of the decedent and several jurors. The widow also engaged in a second conversation of unknown length with another juror. The court reversed the judgment on other grounds but declined to hold that these contacts, standing alone, would require a reversal of the judgment. Id. at 514.

We believe the incident complained of in this case is more similar to the facts of Hamilton v. Poe, Ky., 473 S.W.2d 840 (1971). In Hamilton, the trial court denied a mistrial where "the parties did not discuss any matters relating to the

trial" and the conversation involving the jurors was so casual that it "could not have had any effect in anyway on the outcome of the trial." See also, Bee's Old Reliable Shows v. Maupin's Adm'x, Ky., 226 S.W.2d 23 (1950), and C. V. Hill & Co. v. Hadden's Grocery, Ky., 185 S.W.2d 681 (1945).

Litigants and their attorneys should make every effort not to attempt to associate or to ingratiate themselves with the members of the jury. Whether a contact is sufficiently egregious to warrant a mistrial remains a matter for the sound discretion of the trial court. We find no abuse of that discretion in the court's refusal to end the trial because of counsel's brief, innocuous observations about the weather to the jurors.

The Hensleys have raised two issues with respect to the introduction of documents obtained by Bank One from Marta's credit health insurer, Protective Life. In compliance with a subpoena issued by Bank One, Protective Life produced forms completed by Marta and her physician in seeking disability insurance benefits. Although they contained the diagnosis of Marta's physician, the dates of her treatment, and the nature of those treatments, the documents which were produced were not medical records as such. However, they contained Marta's certification that she had performed no work since she filed for the benefits and that she remained unable to work.

Bank One introduced the forms as evidence bearing on Marta's credibility. Marta testified that she became ill soon after purchasing the pick-up truck. During the months that Protective Life was paying the bulk of her car payment, Marta testified that she was working as the bookkeeper at Terry's grocery store, that she started a counseling business, and that she worked a few hours each morning at the courthouse as an interpreter. Accordingly, her certification in the insurance documents that she was unable to perform any work literally placed Marta's credibility in question. Because the documents constituted relevant evidence, we find no error in their admission.

In defense of its use of these records, Bank One argues that if Protective Life's release of the documents violated the Federal Health Insurance Portability and Accountability Act (HIPPA), the Hensleys must look to Protective Life for relief. We agree. We note, however, that the health information on the documents as revealed to the jury did not contain any information about Marta's medical condition that she had not already disclosed during her direct testimony. Thus, we perceive no abuse of discretion by the court in admitting this evidence.

The Hensleys also cite as error the court's refusal to compel Kevin Vittitow, general manager of Kentucky Auto, to

reveal his annual income. The appellants claim that the amount of his salary "was very relevant to know his real reason to not tell the truth at trial and to make Appellee Kentucky Auto look perfect." (Appellants' brief, p. 12.)

Vittitow testified that he had worked at Kentucky Auto, a small company with about six employees, since its inception 12 years earlier. He also testified that he hoped to purchase the company upon the retirement of its current owner. Thus, the jury was made aware of Vittitow's close personal relationship with the owners of the company as well as his future aspirations. We believe the jury had sufficient information to allow it to assess his motivation and any possible bias. An evaluation of his credibility was not dependent upon knowledge of his income. The issue of any discrepancies between Vittitow's testimony and the other evidence presented at trial was properly decided by the jury. It is not our proper function on review to determine witness credibility in lieu of a jury.

The Hensleys last argue that they were deprived of a fair trial by the numerous and lengthy continuances granted to Kentucky Auto. Our review of the record reveals that the Hensleys did not object to the continuances. Thus, this issue has not been preserved for our review.

The judgment of the Warren Circuit Court is affirmed.

ALL CONCUR.

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