



**In the  
Missouri Court of Appeals  
Western District**

**RICHARD D. SCHAFFER,** )  
 )  
 **Appellant,** ) **WD83380**  
 )  
 **v.** ) **OPINION FILED: May 4, 2021**  
 )  
 **MICKEY J. HOWARD,** )  
 )  
 **Respondent.** )

**Appeal from the Circuit Court of Saline County, Missouri**  
The Honorable Russell J. Kruse, Judge

Before Division Three: Thomas H. Newton, Presiding Judge, Gary D. Witt, Judge and  
W. Douglas Thomson, Judge

Richard Schaffer ("Schaffer") appeals from the judgment of the Circuit Court of Saline County dismissing his breach of implied contract claim and entering judgment in favor of Mickey Howard ("Howard") on Schaffer's fraud claim. We affirm.

**Factual and Procedural Background<sup>1</sup>**

In September of 2012, Schaffer asked a friend to deliver a 1986 BMW 325 automobile ("the vehicle") to Howard's place of business, Extreme Auto Gallery, LLC, ("Extreme Auto") so that Howard could sell the vehicle on Schaffer's behalf. The

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<sup>1</sup> "In the appeal of bench-tried case, the appellate court views the facts in the light most favorable to the trial court's judgment." *Maly Com. Realty, Inc. v. Maher*, 582 S.W.3d 905, 907 n.1 (Mo. App. W.D. 2019).

Petition alleged that Schaffer and Howard had entered into an implied contract wherein Howard agreed to sell the vehicle for a fee of \$250.00 per month, which would be subtracted from the vehicle's sale price of \$2,000.00.<sup>2</sup> Shortly after the delivery, Howard examined the vehicle and found that the clutch was not working properly, the vehicle smelled of mouse urine, and a rocker panel was damaged. Howard contacted Schaffer with a list of items that needed to be repaired and an estimate of the costs. Schaffer refused to repair any of the items, and Howard refused to sell the vehicle in its unrepaired condition.

Howard contacted Schaffer within one week of the delivery, and on numerous subsequent occasions, and requested that Schaffer retrieve the vehicle. Schaffer did not come to Extreme Auto between the time the vehicle was delivered in September of 2012, until June of 2014. At that time, Howard informed Schaffer there was a daily \$5.00 storage fee, which Schaffer refused to pay. Schaffer lived in Independence, Missouri and drove to Marshall, Missouri without a second driver nor any means to collect the vehicle. When Schaffer left Extreme Auto, he did not take the vehicle with him.

Five years later, on July 1, 2019, Schaffer filed his Petition in the small claims division of the circuit court ("small claims court"), and on September 17, 2019, Schaffer filed an Amended Petition alleging that Schaffer and Howard had entered into an implied contract wherein Howard agreed to sell the vehicle for a fee of \$250.00 per month, which would be subtracted from the vehicle's sale price of \$2,000.00. He also alleged that when

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<sup>2</sup> At trial, Schaffer testified that the agreement was that Howard would be paid a single \$250 fee for the sale of the vehicle as well as \$30 per month until it was sold. This discrepancy is not relevant to our analysis of the legal issues presented.

he went to Extreme Auto in June of 2014, he attempted to retrieve the vehicle but felt threatened by Howard's behavior and demeanor and left the vehicle at Extreme Auto. He further alleged that Howard stole his title and ownership interest in the vehicle. Schaffer's Petition is far from clear and appears to raise numerous claims, which can best be categorized as claims for breach of an implied contract and fraud.<sup>3</sup> On July 29, 2019, Howard filed a Motion to Dismiss asserting that: 1) Schaffer failed to state a cause of action for which relief can be granted; 2) Schaffer failed to name a proper party; and 3) Schaffer's claims were barred by the statute of limitations.<sup>4</sup>

On September 17, 2019, the small claims court conducted a bench trial, and on September 27, 2019, the small claims court entered judgment in favor of Howard and against Schaffer on all claims. On October 4, 2019, Schaffer filed an Application for Trial De Novo. On November 22, 2019, the circuit court ("trial court") conducted a de novo bench trial, and after Schaffer rested his case in chief, Howard renewed his Motion to Dismiss. The trial court granted Howard's Motion to Dismiss as to the claim of breach of implied contract holding that the statute of limitations had run on the claim prior to the Petition being filed, but the trial court did not dismiss the claim of fraud holding that it had a ten-year limitation pursuant to section 516.120(5). After the conclusion of all of

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<sup>3</sup> Specifically, Schaffer denominated his claims as "chief complaints" and listed: fraud, auto theft, financial exploitation of an elderly person or person with a disability, and deceptive business practice, but it is clear from the judgment that the trial court considered these claims were for breach of contract and fraud. The trial court's characterization of the claims is not challenged on appeal.

<sup>4</sup> The relevant statute of limitations for breaches of contract and for claims of fraud is contained within section 516.120 RSMo (2016), and all subsequent statutory references are to the Revised Statutes of Missouri (2016).

the evidence, the trial court entered judgment in favor of Howard on the fraud claim. This appeal by Schaffer timely followed.

### **Discussion**

Schaffer raises three points on appeal. First, he asserts the trial court erred in dismissing his claim for breach of implied contract because the claim was not barred by the statute of limitations in that Schaffer's injury occurred in June of 2014 and Schaffer filed his Petition on July 1, 2019. Second, he argues the trial court erred in entering judgment in favor of Howard and against Schaffer in that there is no substantial evidence to support any of the trial court's factual findings regarding Schaffer's fraud claim. Third, he asserts the trial court erred in entering judgment in favor of Howard and against Schaffer because there is no evidence to suggest that Schaffer ever agreed to the transfer of the vehicle's title and Howard failed to present any evidence to suggest on what authority he transferred title to the automobile. We address these claims in turn.

### **Point One**

In his first point relied on, Schaffer argues the trial court erred in dismissing his claim for breach of implied contract because that claim was not barred by the statute of limitations in that Schaffer's injury occurred in June of 2014 and Schaffer filed his Petition on July 1, 2019.

### **Standard of Review**

Rule 73.01(b) provides that "[a]fter the plaintiff has completed presentation of plaintiff's evidence, a defendant may move by motion for judgment on the grounds that upon the facts and law the plaintiff is not entitled to relief." Thus, a dispositive motion

made after the plaintiff's evidentiary presentation has closed is treated as a judgment on the merits. Therefore, we will affirm the trial court's judgment of a Rule 73.01 motion "unless we find that 'there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law.'" *Sw. Bell Tel. Co. v. Ahrens Contracting, Inc.*, 366 S.W.3d 602, 606 (Mo. App. E.D. 2012) (citing *Nautilus Ins. Co. v. I-70 Used Cars, Inc.*, 154 S.W.3d 521, 527 (Mo. App. W.D. 2005)). When presented with an issue of mixed questions of law and fact, we defer to the factual findings made by the trial court so long as they are supported by competent substantial evidence, but will review *de novo* the application of the law to those facts. *Pearson v. Koster*, 367 S.W.3d 36, 44 (Mo. banc 2012).

### **Analysis**

Section 516.120(1) provides that certain actions must commence within five years including:

All actions upon contracts, obligations or liabilities, express or implied, except those mentioned in 516.110, and except upon judgments or decrees of a court of record, and except where a different time is herein limited[.]<sup>5</sup>

The statute of limitations begins to run when the circumstances would place a reasonably prudent person on notice of a potentially actionable injury. *Dempsey v. Johnston*, 299 S.W.3d 704, 706 (Mo. App. E.D. 2009). The trial court found, based on testimony that it found credible, that Schaffer had a friend deliver the vehicle to Extreme Auto in September of 2012, and after inspecting the vehicle, Howard contacted Schaffer with a

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<sup>5</sup> Section 516.110(1) imposes a ten-year limitation for "action[s] upon any writing, whether sealed or unsealed, for the payment of money or property[.]" Because Schaffer does not allege the agreement between Schaffer and Howard was in writing, the agreement is not governed by the ten-year limitation contained within section 516.110(1).

list of items that needed to be repaired before the vehicle could be sold. Schaffer refused to repair any of the items, and one week after the vehicle's delivery, Howard requested that Schaffer pick up the vehicle. Schaffer did not attempt to pick up the vehicle until almost two years later in June of 2014. Therefore, to the extent that an implied contract existed between Howard and Schaffer, a reasonable person in Schaffer's position would have been on notice that Howard either breached or attempted to unilaterally terminate that contract when Howard requested Schaffer pick up the vehicle in September or October of 2012. Thus, the statute of limitations started to run at the latest in October of 2012, and because Schaffer did not file his Petition until July 1, 2019, more than five years after the alleged breach, the trial court correctly held that his claims arising from the breach of the implied contract were barred by the statute of limitations.<sup>6</sup>

Point One is denied.

### **Points Two and Three**

In his second and third points, Schaffer argues that the trial court erred in finding that Howard did not engage in any fraud in that: (1) the vehicle is not titled in Schaffer's name and Howard "clearly refused to allow [Schaffer] to have access to the [vehicle];" and (2) there is no evidence to suggest that Schaffer agreed to transfer the vehicle's title to Howard; and (3) Howard failed to present any evidence to suggest on what authority he transferred the vehicle's title. We discuss these points together for ease of analysis.

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<sup>6</sup> The trial court held that Schaffer's claims of fraud were not time-barred pursuant to section 516.120(5), which has been interpreted to mean that "a claim for fraud must be brought within five years from the date the cause of action accrued, i.e., the date the facts constituting the fraud were discovered or, with reasonable diligence, could have been discovered, but no longer than ten years after they occurred." *Boland v. Saint Luke's Health Sys.*, 588 S.W.3d 879, 882 (Mo. banc 2019). The trial court's decision regarding the application of the statute of limitations to Schaffer's fraud claim is not challenged on appeal.

## **Standard of Review**

On appeal of a bench-tried case, the trial court's judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. A claim that there is no substantial evidence to support the judgment or that the judgment is against the weight of the evidence necessarily involves review of the trial court's factual determinations. An appellate court will overturn a trial court's judgment under these fact-based standards of review only when the court has a firm belief that the judgment is wrong.

*Sauvain v. Acceptance Indem. Ins. Co.*, 437 S.W.3d 296, 302 (Mo. App. W.D. 2014) (internal citations and quotations omitted). We view the evidence in the light most favorable to the circuit court's judgment and need not consider contrary evidence and defer to the trial court's credibility determinations. *Ivie v. Smith*, 439 S.W.3d 189, 200 (Mo. banc 2014). Schaffer's arguments misconstrue our standard of review in arguing that his testimony should be found to be more credible than Howard's and arguing that we should rule in his favor because Howard failed to present evidence to support certain issues. This court is not a fact-finding court, we defer to the trial court's findings regarding the credibility of witnesses. Further, because Howard did not bring any claims against Schaffer, Howard did not bear the burden of proof on any issue, and it was solely Schaffer's burden to present sufficient credible evidence to support each element of his claims against Howard.

## **Analysis**

There are nine elements necessary to establish a claim of fraud: "1) a representation; 2) its falsity; 3) its materiality; 4) the speaker's knowledge of its falsity, or his ignorance of its truth; 5) the speaker's intent that it should be acted on by the person

and in the manner reasonably contemplated; 6) the hearer's ignorance of the falsity of the representation; 7) the hearer's reliance on the representation being true; 8) his right to rely thereon; and, 9) the hearer's consequent and proximately caused injury." *Boland v. St. Luke's Health Sys.*, 588 S.W.3d, 879, 883 n.7 (Mo. banc 2019) (quoting *Heberer v. Shell Oil Co.*, 744 S.W.2d 441, 443 (Mo. banc 1988)). A claim of fraud will fail, if a plaintiff fails to establish any one of these elements. *CADCO, Inc. v. Fleetwood Enters., Inc.*, 220 S.W.3d 426, 436 (Mo. App. E.D. 2007).

In the instant case, Schaffer asserts that he was injured because Howard improperly transferred title to the vehicle to himself and Howard unlawfully deprived Schaffer of possession of the vehicle. However, Howard testified as to multiple phone calls to Schaffer requesting that he retrieve the vehicle starting shortly after it was delivered, and the trial court specifically found that Howard did not "deny [Schaffer] the right to remove the vehicle from [Extreme Auto]" in June of 2014. Further, the trial court found that Schaffer "came from Independence, Missouri to Marshall, Missouri with no second driver nor any means to collect the vehicle," and that "[t]he vehicle is still titled in [Schaffer's] name[.]" Schaffer contends these factual findings are not supported by substantial evidence. We disagree.

Howard testified that he and Schaffer never reached an agreement regarding the sale of the car, because Schaffer did not want to pay for the repairs that Howard felt were necessary before the car could be sold. In his testimony regarding the incident in June of 2014, Howard denied that he blocked Schaffer from gaining access to the vehicle.



Further, Howard testified that he made numerous requests to Schaffer over the course of several years for Schaffer to retrieve the vehicle.

Schaffer testified that:

[Howard] denied me the privilege of taking my car. I had a friend with a truck and trailer standing by available to drive to Marshall to pick the car up on that day. He denied me access to it. He stood in front of me and would not allow me to get to my car, and he said he did not; he did.

In an exchange between the trial court and Schaffer, the court stated:

But I don't find that credible. To be honest with you, I don't find that he stopped you from taking your car. I find that you chose for whatever reason not to pick it up or maybe you didn't even have the ability to pick it up, and you waited five more years before you took any action at all.

"In a court-tried civil case it is the court's duty to judge the credibility of the witnesses and the weight to be given to their testimony. The judge is free to believe none, part, or all of the testimony and chooses between conflicting evidence." *White v. R.L. Persons Constr., Inc.*, 503 S.W.3d 339, 342 (Mo. App. S.D. 2016). In the instant case, Schaffer and Howard presented conflicting testimony, and the trial court found Howard's testimony more credible than Schaffer's testimony. Furthermore, the trial court found that Schaffer was still the title owner of the vehicle, and Schaffer did not produce any evidence that Howard ever had the vehicle retitled in Howard's name. In fact, Schaffer testified himself that the title "has my name on it and my signature on it," and in one exchange, the court stated: "I don't think anybody has any dispute about who has their name on the title of that vehicle from the evidence that I've heard thus far." Schaffer failed to meet his burden to prove through credible evidence that he had sustained an injury from Howard's alleged fraud because he failed to demonstrate that either the

vehicle was wrongly titled in Howard's name or that Howard prevented Schaffer from retrieving his vehicle at any time and specifically did not prevent him from retrieving it in June of 2014.

Points Two and Three are denied.

### **Conclusion**

We affirm.<sup>7</sup>

  
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Gary D. Witt, Judge

All concur

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<sup>7</sup> On December 8, 2020, Howard filed a Motion for Sanctions pursuant to Rule 84.19 (2020), which was taken with the case; that Motion is denied.