[Cite as *Pegram v. Painter*, 2010-Ohio-2934.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JAMES PEGRAM

Plaintiff-Appellee

-vs-

CURTIS PAINTER

Defendant-Appellant

JUDGES:
Hon. William B. Hoffman, P. J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 09 CA 59

O P I N I O N

CHARACTER OF PROCEEDING: Civil Appeal from the Court of Common Pleas, Case No. 07 CV 572

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: June 21, 2010

APPEARANCES:

For Plaintiff-Appellee

WAYNE A. BROWN
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Columbus, Ohio 43206

For Defendant-Appellant

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Wise, J.

{¶1} Appellant Curtis Painter appeals the decision of the Court of Common Pleas, Fairfield County, which awarded monetary damages to Appellee James Pegram in a breach of contract action brought by appellee, as the seller. The relevant facts leading to this appeal are as follows.

{¶2} In May 2003, Appellee James Pegram purchased a 2002 Fleetwood Discovery recreational vehicle (hereinafter "RV") from Ricart Automotive for the approximate sum of $150,000.00. As part of the transaction, appellee signed a non-assumable promissory note financing the RV with a required payment of $1,014.00 per month for a period of 240 months.

{¶3} In late 2004 or early 2005, appellee and his wife decided that they no longer wanted to keep the RV. At that point, the loan balance had been paid down to approximately $142,000.00. Appellant learned of appellee's interest in selling the vehicle (even though the two men were not acquainted) by word of mouth between various relatives and friends.

{¶4} Accordingly, shortly thereafter, appellant visited appellee and looked over the RV. According to appellee, he offered to sell the vehicle to appellant for the balance due of appellee's loan. Appellant responded that he was unsure of his ability to obtain financing for that proposal.

{¶5} After further discussion, appellant and appellee each signed the following written document:

{¶6} "Curt Painter will make payments of $1,014 per month on a 2002 Fleetwood Discovery vin # *** to Jim Pegram until such time as Curt Painter is able to

purchase the vehicle. Curt Painter will also starting February 1, 2005 keep insurance in his name on the vehicle and reimburse Jim Pegram for license plate fees."

{¶7} Appellee thereafter transferred possession of the RV to appellant, but never transferred the title. Appellant, despite apparently failing to obtain bank financing, paid $1,014.00 per month to appellee for a total of twenty-three months, and further maintained insurance on the vehicle during that time.

{¶8} In January 2007, after making said twenty-three payments, appellant physically returned the RV to appellee's adult son. Appellee thereafter tried to sell the vehicle to Ricart, the original dealer, but was unsuccessful. Appellee thus resumed the payments himself. He then put the vehicle into storage at his son's residence.

{¶9} On May 14, 2007, appellee filed a civil complaint against appellant, essentially alleging breach of contract.

{¶10} The case was originally scheduled to go forward as a jury trial on November 18, 2008. Appellee was dissatisfied with appellant's response to discovery requests, and filed a motion to compel discovery which the trial court overruled on September 12, 2008. Appellee filed a motion to reconsider the court's decision not to compel discovery on October 1, 2008. While that issue was pending, appellant's then-counsel filed a motion to withdraw from representation on October 8, 2008. The court granted the motion to withdraw on November 18, 2008. Furthermore, on October 27, 2008, the court granted appellee's motion to reconsider and ordered appellant to respond to appellee's discovery requests.

{¶11} On December 22, 2008, appellee filed a motion for sanctions regarding appellant's lack of compliance with the discovery order of October 27, 2008. At this

time, appellant was without an attorney of record. On January 8, 2009, appellant's new counsel entered an appearance and filed a memorandum contra to appellee's motion for sanctions. Appellant's new counsel also entered a waiver of jury trial and requested a continuance.

{¶12} On March 19, 2009, the trial court awarded $2,500.00 to appellee in attorney fees. Appellant thereupon filed a motion to reconsider that decision. The trial court did not thereafter explicitly rule on said motion to reconsider.

{¶13} On May 5, 2009, the case proceeded to a bench trial.

{¶14} On September 23, 2009, the trial court issued a twelve-page judgment entry finding that the parties had entered into an enforceable contract for the sale of the RV in the amount of $142,861.64. The court determined, inter alia, that "[p]ursuant to ORC § 1302.05, the terms of a written agreement, when not found to be contradictory, can be supplemented and explained by the parties' course of dealing, ORC § 1301.11, and course of performance, ORC § 1302.11." Judgment Entry at 5. The trial court further awarded damages to appellee in the amount of $64,438.81, representing the sum total of a portion of the RV loan payments ($17,832.00), plus the diminution of the RV's value ($43,972.29), plus the vehicle insurance payments made by appellee ($2,634.52).

{¶15} On October 21, 2009, appellant filed a notice of appeal. He herein raises the following four Assignments of Error:

{¶16} "I. THE TRIAL COURT ERRED BY ADMITTING THE TESTIMONY OF RHETT RICART.

{¶17} "II. THE TRIAL COURT ERRED BY FINDING THAT THE PARTIES AGREED UPON A PRICE FOR THE RECREATIONAL VEHICLE.

{¶18} "III. THE COURT ERRED IN NOT VACATING ITS AWARD OF ATTORNEY FEES TO APPELLEE.

{¶19} "IV. THE TRIAL COURT ERRED IN CONCLUDING THAT THE APPELLANT FAILED TO ESTABLISH THAT HE ACTED IN GOOD FAITH."

I.

{¶20} In his First Assignment of Error, appellant contends the trial court erred in allowing the deposition testimony of Rhett Ricart, who provided an opinion as to the value of the RV. We disagree.

{¶21} The admission or exclusion of evidence rests in the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 180, 510 N.E.2d 343. As a general rule, all relevant evidence is admissible. Evid.R. 402. Our task is to look at the totality of the circumstances in the particular case and determine whether the trial court acted unreasonably, arbitrarily, or unconscionably in its redress of the disputed evidence. See *State v. Oman* (Feb. 14, 2000), Stark App.No. 1999CA00027.

{¶22} Appellant first contends that the trial court improperly allowed Ricart to rely on vehicle values listed in the National Automobile Dealers Association ("NADA") price book. In addressing the issue, the trial court referenced Evid.R. 803(17), which excludes from the hearsay rule "[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations." Ohio courts have recognized that the NADA handbook is a standard tool for determining the value of a vehicle. See, e.g., *Hess v. Riedel-Hess*, 153

Ohio App.3d 337, 794 N.E.2d 96, 2003-Ohio- 3912, ¶ 25, citing *Welsh v. Yoshida* (Apr. 19, 2002), Lake App. No. 2001-L-033, 2002 WL 603051, additional citations omitted. We thus find no merit in this portion of appellant's argument.

{¶23} Appellant next contends that Ricart was not qualified as an expert on vehicle values.

{¶24} Evid.R. 702 reads as follows in pertinent part:

{¶25} "A witness may testify as an expert if all of the following apply:

{¶26} "(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

{¶27} "(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

{¶28} "(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. * * *."

{¶29} "In general, courts should admit expert testimony whenever it is relevant and satisfies Evid.R. 702." *Valentine v. PPG Industries,* 158 Ohio App.3d 615, 628, 2004-Ohio-4521, judgment affirmed 110 Ohio St.3d 42, 2006-Ohio-3561, citing *State v. Nemeth* (1998), 82 Ohio St.3d 202, 207, 694 N.E.2d 1332. "The test to be applied in determining the competency of the witness to testify as an expert is implied from the definition of expert evidence; his qualification depends upon his possession of special knowledge which he can impart to the jury, and which will assist it in regard to a pertinent matter ***." *Reed v. Hodge* (Feb. 27, 1975), Cuyahoga App.No.33509, 1975 WL 182446, citing *Ohio & Indiana Torpedo Co. v. Fishburn* (1900), 61 Ohio St. 608. In

the case sub judice, appellee's counsel questioned Ricart about his occupational background, revealing that Ricart had nearly forty years experience in the automobile sales business, roughly twenty-five of which included selling RVs. He indicated that he was "very familiar" with RV price valuations. Ricart Depo. at 9. Accordingly, we hold the trial court did not abuse its discretion in qualifying Ricart as an expert on the subject of vehicle valuation.

{¶30} Finally, appellant argues that Ricart's testimony was impermissibly based on hearsay. While indeed Ricart supplemented his own opinion that the RV market was depressed by referencing information from other sources, we hold that Ricart's testimony in toto does not rise to the level of abuse of discretion. Furthermore, we note that "[w]hen a matter is tried before the court in a bench trial, there is a presumption that the trial judge considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary." *In re Fair*, Lake App.No. 2007-L-166, 2009-Ohio-683, ¶ 66, internal quotations and additional citations omitted.

{¶31} Appellant's First Assignment of Error is therefore overruled.

II.

{¶32} In his Second Assignment of Error, appellant contends the trial court erred in finding that the parties agreed upon a price for the RV. We disagree.[1]

{¶33} As an appellate court, we are not fact finders; we neither weigh the evidence nor judge the credibility of witnesses. Our role is to determine whether there is relevant, competent and credible evidence upon which the fact finder could base his or

[1] We note neither side disputes the trial court's application of UCC provisions per se to the transaction at issue. See *O'Byron v. Poff,* Wayne App.No. 02CA0061, 2003-Ohio-3405, ¶ 12.

her judgment. *Peterson v. Peterson,* Muskingum App.No. CT2003-0049, 2004-Ohio-4714, ¶ 10, citing *Cross Truck v. Jeffries* (Feb. 10, 1982), Stark App. No. CA-5758.

{¶34} "In order to declare the existence of a contract, both parties to the contract must consent to its terms; there must be a meeting of the minds of both parties; and the contract must be definite and certain." *Sigler v. State*, Richland App.No. 08-CA-79, 2009-Ohio-2010, ¶ 82, quoting *Episcopal Retirement Homes v. Ohio Dept. of Indus. Relations* (1991), 61 Ohio St.3d 366, 369, 575 N.E.2d 134. Price is an essential element of a contract. *Ross v. Belden Park,* (June 1, 1998), Stark App.No. 1996CA00429. "[W]hen a contract provision is ambiguous and the court relies on parol evidence for its interpretation, a reviewing court defers to the findings of the trial court." *Dzina v. Dzina,* Cuyahoga App.No. 83148, 2004-Ohio-4497, ¶ 97 (citations omitted).

{¶35} Appellant urges that an actual figure for the agreed price does not appear in the written contract, any attachment thereto, or other document in evidence. Thus, appellant argues, there was no mutual assent or meeting of the minds as to price. However, a review of the record and trial testimony reveals the following:

{¶36} Appellee testified that he delivered an amortization schedule to appellant at the time of delivery. Tr. at 91, 98. Larry Pegram, appellee's son, informed appellant of the price and showed him the amortization table. Tr at 148. Larry Pegram testified that appellant did not try to negotiate a different purchase price. Id. Larry also recalled that appellant did not ask any questions about the purchase price. Tr. at 149. Larry Pegram took appellant to Huntington National Bank and observed appellant completing a loan application for $143,000.00. Tr. at 152. Appellee thereafter again delivered amortization papers when the RV was delivered. Tr. at 158-160. Appellant knew the

payoff at the time of the bank visit and was informed that he would need to come up with the difference between the amount owed on the RV and its current value at the time. Tr. at 151-162.

{¶37} Upon review of the record in this matter, we our disinclined to substitute our judgment, regarding the existence of an agreed price, for that of the trial judge who observed the proceedings firsthand.

{¶38} Appellant's Second Assignment of Error is therefore overruled.

III.

{¶39} In his Third Assignment of Error, appellant contends the trial court erred in declining to reconsider or vacate its award of $2500.00 in attorney fees to appellee, which stemmed from appellant's failure to respond to discovery. We disagree.

{¶40} A trial court's failure to rule on a motion is normally deemed to be a denial of that motion for purposes of appellate review. *Sabbatis v. Burkey*, 166 Ohio App.3d 739, 853 N.E.2d 329, 2006-Ohio-2395, ¶ 33, citing *State v. Olah* (2001), 146 Ohio App.3d 586, 767 N.E.2d 755, fn. 2. An appellate court will not reverse a trial court's decision regarding disposition of discovery issues absent an abuse of discretion. *State ex rel. The V Cos. v. Marshall* (1998), 81 Ohio St.3d 467, 469, 692 N.E.2d 198. Specifically, a trial court's order requiring one party to pay attorney fees to another as a sanction for discovery failure is reviewed under an abuse of discretion standard. See *Bobb Chevrolet, Inc. v. Dobbins*, Ross App.No. 01CA2621, 2002-Ohio-4256, ¶ 28-¶ 30; Civ.R. 37(A).

{¶41} In the case sub judice, appellee's counsel served appellant with discovery requests with the complaint. Appellee maintains that appellant's responses were

incomplete, if not evasive. Appellee filed two motions to compel discovery in the early stages of discovery. The court sustained the two motions, ordering appellant to provide appellee with the requested discovery. Appellant continued to refuse to abide by the court's order despite numerous formal and informal attempts to compel discovery. As the trial date approached, appellee filed another motion to compel and requested sanctions. The court sustained the final motion to compel and appellant's original counsel requested additional time to obtain the documents. The documents were never provided and the original counsel withdrew. New counsel entered his appearance on January 8, 2009. Even though he filed his motion for reconsideration of sanctions in March 2009, appellant did not file his discovery response until May 4, 2009, even though the trial was scheduled for May 5, 2009. Appellee ultimately received the discovery about a day before trial.

{¶42} Although appellant seeks to attribute the majority of the discovery problems in this matter to an alleged breakdown in attorney-client communication with his first lawyer, the details of which are not disclosed in the record, upon review we are unpersuaded the trial court abused its discretion in implicitly denying appellant's motion to reconsider the award of attorney fees.

{¶43} Appellant's Third Assignment of Error is overruled.

IV.

{¶44} In his Fourth Assignment of Error, appellant contends the trial court erred in finding that appellant did not act in good faith. We disagree.

{¶45} Appellant argues that appellee's case was essentially based on allegations of breach of contract, as opposed to allegations of bad faith per se, and thus

the trial court improperly "strayed outside the issues" set forth in the pleadings. Appellant's Brief at 18. However, we agree with appellee that R.C. 1301.09 imposes an obligation of good faith in the performance of a contract or a duty, and that this does not support an independent cause of action for failure to perform or enforce in good faith in general contract disputes.[2] We emphasize that an appellant, in order to secure reversal of a judgment, must generally show that a recited error was prejudicial to him. See *Tate v. Tate,* Richland App.No. 02-CA-86, 2004-Ohio-22, ¶ 15, citing *Ames v. All American Truck & Trailer Service* (Feb. 8, 1991), Lucas App. No. L-89-295, quoting *Smith v. Flesher* (1967), 12 Ohio St.2d 107, 110, 233 N.E.2d 137. In the case sub judice, because the evidence convincingly reveals a fundamental breach of contract by appellant, the additional findings by the trial court as to bad faith do not constitute reversible error.

[2] A notable exception would be in the realm of insurance law. In Ohio, insureds may pursue a bad faith tort claim against their insurers. See, e.g., *Gallo v. Westfield National Ins. Co.,* Cuyahoga App.No. 91893, 2009-Ohio-1094, ¶ 15.

{¶46} Appellant's Fourth Assignment of Error is overruled.

{¶47} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Fairfield County, Ohio, is affirmed.

By: Wise, J.

Hoffman, P. J., and

Farmer, J., concur.

/S/ JOHN W. WISE_____

/S/ WILLIAM B. HOFFMAN_____

/S/ SHEILA G. FARMER_____

JUDGES

JWW/d 518

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JAMES PEGRAM	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
CURTIS PAINTER	:	
	:	
Defendant-Appellant	:	Case No. 09 CA 59

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Fairfield County, Ohio, is affirmed.

Costs assessed to appellant.

/S/ JOHN W. WISE_____

/S/ WILLIAM B. HOFFMAN_____

/S/ SHEILA G. FARMER_____

JUDGES