[Cite as *Moore v. Vandemark Co., Inc.*, 2004-Ohio-4313.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

ANDRE MOORE, et al.,	:	
Plaintiffs-Appellees,	:	CASE NO. CA2003-07-063
	:	O P I N I O N
- vs -		8/16/2004
	:	
VANDEMARK COMPANY, INC.,	:	
Defendant-Appellant.	:	

CIVIL APPEAL FROM CLERMONT COUNTY MUNICIPAL COURT
Case No. 2002 CVH 00714

Benjamin, Yocum & Heather LLC, Christopher J. Mulvaney, 312 Elm Street, Suite 1850, Cincinnati, Ohio 45202, for plaintiffs-appellees

Paul R. Yelton, 424 West Plane Street, P.O. Box 67, Bethel, Ohio 45106, for defendant-appellant

WALSH, J.

{¶1} Defendant-appellant, Vandemark Co., Inc., appeals the decision of the Clermont County Municipal Court to admit hearsay evidence and to award plaintiffs-appellees, Andre and Carol Moore ("the Moores"), attorney fees in a Consumer Sales Practice Act ("CSPA") action. We affirm the decision of the trial court.

{¶2} The Moores began having engine trouble with their 1994

Cadillac Seville in the spring of 2001. The Moores took their vehicle to Camargo Cadillac for an inspection. Camargo Cadillac recommended a complete engine replacement and gave the Moores an estimate of $7,000.

{¶3} The Moores contacted appellant for a price quote. Appellant informed the Moores that they had a used Cadillac 32V Northstar engine in stock and quoted a price of $2,595. The Moores towed their vehicle to appellant's place of business on July 28, 2001. Appellant gave the Moores an estimate of $3,690.23 to replace the engine. The estimate included the cost of the engine, $595 in labor, $200 in miscellaneous charges, taxes, and an environmental disposal fee. Appellant then told the Moores that the vehicle would be done in approximately seven to ten days.

{¶4} On July 30, 2001, appellant telephoned the Moores and stated that they were unaware that the vehicle had a 32V Northstar engine and that they would have to increase the price of labor for the engine installation. Appellant then called the Moores periodically to inform them that the used 32V Northstar replacement engine needed numerous parts replaced. The water pump, thermostat, spark plugs, serpentine belt, oil pan gasket, rear main seal, and radiator fluid were all replaced. The air conditioning was also recharged. The additional replacement parts totaled $666.67.

{¶5} The vehicle was not ready to be picked up on August 11, 2001. When the vehicle was still not ready by August 17, 2001,

the Moores went to appellant's place of business and demanded the return of their vehicle. Appellant refused to turn over the vehicle.

{¶6} The vehicle was completed on August 30, 2001. The total cost for the engine replacement was $5,365. On the way home from appellant's shop, the vehicle overheated and broke down. The vehicle was towed back to appellant's business. The thermostat was replaced.

{¶7} The Moores picked up the vehicle a second time on September 7, 2001. The vehicle broke down again after a 20-mile drive. Appellant advised the Moores to have the vehicle towed back to its business. The Moores instead had the vehicle towed to Camargo Cadillac.

{¶8} Camargo Cadillac replaced the water pump and thermostat for a $176 charge. Furthermore, Camargo Cadillac suggested that the aftermarket radiator appellant installed should be replaced with a Cadillac model.

{¶9} The Moores contacted appellant on September 14 and September 22, 2001 to inform appellant about the additional work done by Camargo Cadillac. Appellant would not agree to reimburse the Moores for the repairs made by Camargo Cadillac. The Moores again contacted appellant on October 12, 2001 to complain of ongoing problems with the engine. Appellant informed the Moores that the vehicle was out of warranty.

{¶10} On March 5, 2002, the Moores filed a complaint against appellant for breach of contract, breach of warranty, and viola-

tions of the Ohio Consumer Sales Practices Act. A jury trial was held on April 10, 2003. The jury awarded the Moores $2,000 for a CSPA violation and $2,000 for their breach of contract claim. The jury found for appellant on the breach of warranty claim.

{¶11} On May 13, 2003, the Moores filed a motion for treble damages, attorney fees, costs, and prejudgment interest. On June 18, 2003, the trial court conducted a hearing on the motion and awarded the Moores treble damages on the violation of the CSPA, increasing the award to $6,000. The court also awarded attorney fees in the amount of $12,736.

{¶12} Appellant appeals the decision raising two assignments of error:

{¶13} Assignment of Error No. 1:

{¶14} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT/APPELLANT, BY ADMITTING INTO EVIDENCE AN EXHIBIT OF PLAINTIFFS/APPELLEES CONTRARY TO RULE 802 AND RULE 803, OHIO RULES OF EVIDENCE, OVER OBJECTION OF DEFENDANT/APPELLANT."

{¶15} Appellant argues that the Moores' cellular telephone bill should have been excluded as hearsay because Mr. Moore was not qualified to authenticate the bill as a business record. Appellant further contends that this error was prejudicial and warrants reversal of the judgment below.

{¶16} Our review of the trial transcript reveals that the Moores' attorney did, in fact, use the cellular telephone bill to prove the truth of matters asserted within it; that Mr. Moore telephoned appellant on specific dates. Such evidence is

normally excluded by Evid.R. 802 unless it falls within a recognized exception to the hearsay rule. See United States v. Jefferson (C.A.10, 1991), 925 F.2d 1242, 1252 (under Fed.R.Evid. 802, pager bill was inadmissible hearsay to show that defendant owned a pager). A telephone record or other such document can often fall within the business record exception provided under Evid.R. 803(6). See, e.g., State v. Knox (1984), 18 Ohio App.3d 36, 37. However, this rule has an authentication requirement which must be met before the rule applies. The rule provides, in relevant part:

{¶17} "(6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Evid.R. 803(6).

{¶18} This rule requires that some person testify as to the regularity and reliability of the business activity involved in the creation of the record. In the instant case, the Moores did not call a Cingular Wireless employee to testify as to the nature of their billing practices. The only foundation for the evidence

came through Mr. Moore. That foundation was not adequate. The witness providing the foundation need not have firsthand knowledge of the transaction. 1 Weissenberger's Ohio Evidence (1985) 75-76. Nevertheless, "it must be demonstrated that the witness is sufficiently familiar with the operation of the business and with the circumstances of the record's preparation, maintenance and retrieval, that he can reasonably testify on the basis of this knowledge that the record is what it purports to be, and that it was made in the ordinary course of business consistent with the elements of Evid.R. 803(6)." State v. Vrona (1988), 47 Ohio App.3d 145, 148. Mr. Moore's experience as a customer of the cellular telephone service could not give him the knowledge necessary under the rule, nor did he exhibit such knowledge on the stand. See, e.g., State v. Hirtzinger (1997), 124 Ohio App.3d 40. Therefore, because the cellular telephone bill in the instant case was hearsay not within any exception and it was error to allow the evidence to be admitted.

{¶19} However, the error was not prejudicial. Mr. Moore testified at trial to every phone conversation he had with appellant. Mr. Moore also kept a log of his contacts with appellant. The log was entered into evidence as "Plaintiff's Exhibit 2." The admission of the cellular phone bill, as "Plaintiff's Exhibit 7," under a "business records" exception to the hearsay rule was cumulative where testimony and a handwritten log of every telephone conversation the Moores had with appellant was also introduced into evidence.

{¶20} Any error in the admission of hearsay is generally harmless when the declarant is cross-examined on the same matters and the seemingly erroneous evidence is cumulative in nature. See Rondy, Inc. v. Goodyear Tire Rubber Co., Summit App. No. 21608, 2004-Ohio-835, at ¶16, citing McDermott v. McDermott, Fulton App. No. F-02-023, 2003-Ohio-2361, at ¶22. Civ.R. 61 provides:

{¶21} "No error in either the admission or the exclusion of evidence *** is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." See, also, Siuda v. Howard, Hamilton App. Nos. C-000656 and C-000687, 2002-Ohio-2292, at ¶21, citing Meyers v. Hot Bagel Factory, Inc. (1999), 131 Ohio App.3d 82, 100-101, (stating that "harmless error is an error that does not affect the substantial rights of the parties").

{¶22} In determining "whether a substantial right of a party has been affected, the reviewing court must decide whether the trier of fact would have reached the same decision, had the error not occurred." Prakash v. Copley Twp., Summit App. No. 21057, 2003-Ohio-642, at ¶16. In the instant case, appellant argues that the Moores attorney used the cellular phone bill to "attack

and tear down the veracity, reputation and owner/customer concerns" of Greg Vandemark. However, the Moores' attorney also used Mr. Moore's testimony and Mr. Moore's handwritten log of the same phone calls. Any error in the admission of this exhibit was harmless as it was cumulative in nature and the trier of fact would have reached the same decision, had the error not occurred. See McDermott at ¶22.

{¶23} Consequently, in light of the other evidence presented at trial, we conclude that the cellular phone bill could not have affected appellant's substantial rights. See Rome Rock Assoc., Inc. v. Warsing (Dec. 17, 1999), Ashtabula App. No. 98-A-0051 (concluding that the appellant was not prejudiced by an alleged hearsay affidavit, as other evidence existed; therefore, any error was harmless). Consequently, the first assignment of error is overruled.

{¶24} Assignment of Error No. 2:

{¶25} "THE TRIAL ERRED [SIC], TO THE PREJUDICE OF DEFENDANT/APPELLANT, IN AWARDING ATTORNEY FEES TO PLAINTIFFS/APPELLEES, PURSUANT TO R.C. 1345.09(f)(2), IN AN AMOUNT WHICH WAS UNREASONABLE, WHICH WAS BASED, IN PART, ON A CAUSE OF ACTION FOR WHICH NO SUCH AWARD CAN BE MADE, AND WITHOUT STATING THE BASIS FOR THE FEE DETERMINATION."

{¶26} R.C. 1345.09(F)(2) provides for an award of reasonable attorney fees to the prevailing party in actions where a knowing violation of the CSPA occurs. Dobbins v. Kalbaugh, Summit App. Nos. 20714, 20920, and 20918, 2002-Ohio-6465, at ¶39. A trial

court's determination in regards to an award of attorney fees will not be disturbed on appeal absent an abuse of discretion. Bittner v. Tri-County Toyota, Inc. (1991), 58 Ohio St.3d 143, 146. An abuse of discretion is "more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. Pons v. Ohio State Med. Bd., 66 Ohio St.3d 619, 621, 1993-Ohio-122.

{¶27} In Bittner, the Ohio Supreme Court described the proper procedure a trial court is to follow when determining the amount of reasonable fees to award pursuant to a CSPA violation. "[T]he trial court should first calculate the number of hours reasonably expended on the case times an hourly fee, and then may modify that calculation by application of the factors listed in DR 2-106(B)." Bittner, 58 Ohio St.3d at 145. Those factors include the following: The time and labor involved in maintaining the litigation; the novelty and difficulty of the questions involved; the professional skill required to perform the necessary legal services; the attorney's inability to accept other cases; the fee customarily charged; the amount involved and the results obtained; any necessary time limitations; the nature and length of the attorney/client relationship; the experience, reputation, and ability of the attorney; and whether the fee is fixed or contingent. Id. at 145-146. In order for an appellate court to

conduct a meaningful review of the trial court's determination, "the trial court must state the basis for its fee determination." Id. at 146.

{¶28} In the instant case, the trial court awarded $12,736 in attorney fees to the Moores. The Moores' attorney offered as "Plaintiff's Exhibit 10" an itemized billing statement through May 12, 2003 for $11,981. The Moores' attorney testified that he expended additional time in litigating the case after May 12, 2003. He stated that he expended an additional seven hours of time. At $125 per hour, the Moores' attorney requested attorney fees in the amount of $12,865.

{¶29} The trial court awarded $12,736 in attorney fees to the Moores. The Moores' attorney acknowledged that $120 was billed as a duplicate charge. Therefore, the court determined that "subtracting [$120] from $12,856, the Court obtains the amount of $12,736." The court also noted that considering "the time expended on the case, the experience of the attorney, as well as what is a reasonable fee of other attorneys *** the Court finds that the sum of $12,736 is a reasonable amount of attorney fees to be awarded in this case."

{¶30} Appellant argues, in support of its assignment of error, that the trial court erred in awarding $12,736 in attorney fees because the breach of contract claim and the breach of warranty claim are not unfair or deceptive practices under the CSPA, therefore, the hours spent in preparation for those claims should not be included. However, when claims present "a common

core of facts and related legal theories, *** it is permissible for the trial court to treat the total number of hours expended on all claims as reasonably expended hours." Parker v. I & F Insulation Co. (Mar. 27, 1998), Hamilton App. No. C-960602, at *6.

{¶31} Appellant's attorney admitted at the June 18, 2003, hearing on the motion for attorney fees that the breach of contract claim, the breach of warranty claim, and the CSPA claim "all come out of a core of events" and they "all came out of the same series of events." We conclude that the different theories of recovery are not severable and the total number of hours expended on all claims are reasonably expended hours. Therefore, we find that the trial court did not abuse its discretion in awarding $12,736 in attorney fees. Consequently, the second assignment of error is overruled.

Judgment affirmed.

YOUNG, P.J., and VALEN, J., concur.