

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

Ricart Ford, Inc., :  
Plaintiff-Appellant, :  
v. : No. 80AP-881  
John Zizek, :  
Defendant-Appellee. :

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D E C I S I O N

Rendered on July 30, 1981

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WELCH, DANNER, INNIS & BARKER CO., LPA,  
MR. RICHARD L. INNIS,  
985 Schrock Road,  
Columbus, Ohio 43229,

and

WILES, DOUCHER, TRESSLER & VAN BUREN CO., LPA,  
MR. AUSTIN P. WILDMAN, of Counsel,  
300 South Second Street,  
Columbus, Ohio 43215,  
For Plaintiff-Appellant.

MATAN, RINEHART & SMITH,  
MR. DANA G. RINEHART,  
MR. JAMES D. COLNER, of Counsel,  
261 South Front Street,  
Columbus, Ohio 43215,  
For Defendant-Appellee.

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McCORMAC, J.

This case began on July 14, 1976 with the filing of a breach of contract action in the amount of \$603 in Municipal Court by the

EX. 1

plaintiff, Ricart Ford. Defendant, Zizek, filed an answer and counterclaim on August 3, 1976. The case was subsequently certified to Common Pleas Court on January 24, 1977. On October 17, 1977, Ricart voluntarily dismissed its complaint and the matter came on for jury trial on defendant's counterclaim on January 25, 1979. At the close of defendant's case, Ricart moved for a directed verdict which was sustained by the trial court. Zizek appealed and on December 6, 1979, we reversed the judgment of the trial court and remanded the case for a jury trial. In our reversal, we held that Zizek had presented sufficient evidence of all elements of fraud to submit the case to the jury, that he had submitted sufficient evidence of invasion of privacy to raise a jury question and that punitive damages was also a jury question. We also held that the trial court should reconsider his denial of defendant's motion to amend his pleading to assert a claim for relief under the Ohio Consumer Sales Practices Act since the amendment could be made without prejudicing Ricart's defense upon the merits of this claim as there would be sufficient notice to enable Ricart to properly defend against that claim.

Upon remand, the case was tried to a jury who rendered a judgment of \$35,500 against Ricart for compensatory and punitive damages for fraud, invasion of privacy and violation of the Ohio Consumer Sales Practices Act and judgment was entered accordingly.

Ricart has appealed, setting forth the following assignments of error:

- "1. The trial court erred in the giving of an incomplete charge on the issue of fraud over the objection of counsel for Ricart Ford, Inc.
- "2. The trial court erred in charging the jury on the issue of punitive damages.

"3. The trial court erred in its charge to the jury on the issue of the purported violation of the Consumer Sales Practices Act.

"4. The trial court erred in its charge on the issue of invasion of privacy.

"5. The trial court erred in submitting interrogatories to the jury designed to do only mathematical computations.

"6. The trial court erred in allowing the previous testimony of a witness to be read into the record over objection of counsel at trial record page 172.

"7. The trial court erred in permitting counsel to call Mr. Wynn Rees as on cross examination prohibiting counsel for Ricart from examination of this key witness at an important stage in the trial. Trial record page 200.

"8. The trial court erred in the admission of Exhibit F, trial record Page 270.

"9. The verdict and judgment are the result of passion and prejudice inspired by misconduct of counsel.

"10. The verdict and judgment in this case are contrary to the manifest weight of the evidence and contrary to law.

"11. The trial court erred in permitting the Defendants to amend their counter-claim the morning of trial."

The evidence of fraud and invasion of privacy were essentially the same in this appeal as the prior appeal. Ricart seeks to argue again that the evidence was insufficient to support a verdict based upon fraud or invasion of privacy and seeks a redetermination that punitive damages were not applicable. Our decision of December 6, 1979, of which the Supreme Court denied a motion to certify, sets forth the law of the case regarding those issues. Briefly reviewing the pertinent evidence, we again find that there was sufficient evidence of fraud and invasion of

privacy to support a judgment for compensatory and punitive damages.

Zizek traded in a 1972 Corvette on a new Pinto at Ricart Ford. Prior to his contacting Ricart, the Corvette had been damaged in a one-car accident and Zizek had a claim pending with his insurer for collision coverage for the damage. Zizek and his wife both testified that the trade was based upon Ricart's taking the damaged Corvette "as is" and that there was no agreement that Zizek repair the Corvette or that Ricart be entitled to the proceeds due from Zizek's insurer. The documents executed at the time of the sale support Zizek's version. There was no mention on these documents at the time they were executed of any right of Ricart to obtain the insurance proceeds. Thereafter, Ricart unilaterally added to their copies of the sales order, the clause "Damage must be fixed or check claim settled," and a notation "due from ins. \$603.00." When Zizek signed an Ohio retail installment contract for the new Pinto, there was no mention of insurance proceeds, but copies in the control of Ricart contain a notation stating "due from ins. \$603.00." As to the latter notation, Ricart contends that that was a bleed-through from writing on the sales order. However, why and how the language was added was a question of fact for the jury.

In summary, Zizek's evidence was sufficient to enable a jury to find that Ricart agreed to accept the Corvette "as is" without any right to the insurance proceeds due Zizek and that Ricart intentionally and fraudulently attempted to obtain something that was not due them by unilaterally adding language to the sales order and retail installment contract to their benefit. Zizek also testified that the fraudulent act of Ricart caused him actual damage for loss of time from work and attorney fees to defend the breach of contract claim made against him by

Ricart when Ricart sued him, using the altered documents in support of their claim. Zizek's testimony was sufficient to present a jury case for invasion of privacy. According to the testimony of his witnesses, an harrassing and threatening phone call was made to his house suggesting strongly that Zizek was guilty of criminal misconduct by cashing the insurance company's check for the collision damage to the Corvette and that the president of Ricart forced his way into Zizek's home frightening his three children and the babysitter in an attempt to coerce Zizek into giving Ricart the insurance proceeds.

Appellant's second and tenth assignments of error are overruled.

Appellant next asserts that the trial court erred in the giving of an incomplete charge on the issue of fraud.

The trial court charged the jury correctly as to the elements of fraud; however, the trial court did not define fraud otherwise. Ricart originally proposed a charge which defined fraud in accordance with that contained in the Ohio Jury Instructions. However, after the charge was given, which only contained the elements of fraud, there was a discussion concerning objections to the charge and the trial court stated that it was his understanding that Ricart had withdrawn their proposed jury instruction on fraud. It is not clear whether Ricart's counsel then continued to insist upon that portion of the charge be given and, after that statement, there was no further specific objection and request to include the definition of fraud.

The elements of fraud define fraud sufficiently to convey to the jury what was suggested by Ricart's definition which was initially submitted and which may or may not have been withdrawn. While it would have been preferable that the trial court define fraud as suggested by

Ricart, the error, if it be such, was not prejudicial.

Appellant's first assignment of error is overruled.

Appellant asserts that the trial court erred in permitting defendant to amend his counterclaim to assert a violation of the Ohio Consumers Sales Practices Act since the actual amendment was not permitted until the first day of trial. In the prior appeal, we stated that the trial court should consider allowing this amendment because, with the additional time, there would be no surprise and Ricart would have adequate notice to be able to defend against the claim. The supplemental record shows that permission was not granted to amend the claim until the morning of trial on July 28, 1980, but that, on June 23, 1980, the amended claim was proposed as it had been at the first trial in 1979.

Civ. R. 15(A) provides that leave of court to amend a pleading shall be freely given when justice so requires. The trial court did not abuse its discretion in permitting formal amendment of the counterclaim on the morning of the trial in light of the notice given Ricart previously of the intent to assert this claim both in 1979 and again more than a month before the trial commenced.

Appellant's eleventh assignment of error is overruled.

Appellant asserts that the trial court erred in its charge to the jury on the issue of a violation of the Consumer Sales Practices Act. The trial court correctly defined what a consumer transaction was and the statutory requirement that the seller not commit an unconscionable act or practice in connection with a consumer transaction. The trial court also referred to a rule of the Ohio Department of Commerce in regard to the Ohio Consumer Sales Practices Act stating that "it shall be a deceptive act or practice in connection with consumer practice involving a motor

vehicle for a supplier of motor vehicles not to integrate into a written contract all material statements, representations or promises, oral or written, made prior to the written contract by his agent, representative or salesman to a consumer."

Appellant argues that there was no notice of the rule as required by Civ. R. 44.1. However, the record shows that in 1979, at the time of the first trial, there was specific reference to the rule and testimony by Fred Ricart concerning the rule. Appellant also produced testimony concerning the rule.

The trial court's charge was correct and adequately explained the law and rule to the jury.

Appellant's third assignment of error is overruled.

Appellant asserts that the trial court erred in its charge on the issue of invasion of privacy. A review of the charge discloses no error. The charge was reasonably related to the facts of this case and legally correct.

Appellant's fourth assignment of error is overruled.

Appellant asserts that the trial court erred in submitting interrogatories to the jury designed to do only mathematical computations.

Ricart was represented by two counsel, one of whom was representing the interest of a liability insurance company whose position was that their policy covered only compensatory damages for invasion of privacy and no other damages that might be recovered by Zizek, and the other who represented solely Ricart's interest. Counsel for the insurance company submitted interrogatories asking the jury to specify the amount of compensatory and punitive damages applicable to fraud, invasion of privacy, and violation of the Ohio Consumer Sales Practices Act if

recovery was granted Zizek for these claims. Those interrogatories were submitted and answered by the jury. Appellant urges that the interrogatories were contrary to Civ. R. 49.

This appeal involves only the interest of Zizek and Ricart. No third-party claim was filed by Ricart against their insurance company. We need not consider whether the interrogatories were proper under Civ. R. 49, as there has been no prejudice demonstrated so far as Zizek and Ricart are concerned. If there be error, it was harmless so far as this appeal is concerned.

Appellant's fifth assignment of error is overruled.

Appellant contends that the trial court erred in allowing the testimony of a witness at the first trial to be read into the record over objection of counsel.

At the first trial, Dora Jean Compton, an employee of the then party-defendant, J.C. Penney Insurance Company, testified in person. Compton was a resident of Ohio at the time of the first trial. It was agreed that she resided in Florida at the time of the second trial. There was a dispute over whether her correct address in Florida could have readily been found.

Evid. R. 804(B)(1) permits former testimony of a witness to be admissible as an exception to the hearsay rule if the party against whom the testimony is now offered had an opportunity for cross-examination and the declarant is unavailable as a witness. Compton testified at the first trial and appellant had an opportunity to cross-examine her. Evid. R. 804(A)(5) provides that the declarant is unavailable as a witness if absent from the hearing and the proponent of the testimony has been

unable to procure the declarant's attendance by process or other reasonable means. Since it was conceded that the witness resided in Florida, it appears that the unavailability of the witness was established.

In any event, the testimony of the witness was not prejudicial as it was cumulative. Ricart's employees admitted the matters to which she testified.

Appellant's sixth assignment of error is overruled.

Appellant contends that the trial court erred in permitting Zizek's counsel to call Wynn Rees on cross-examination, thus prohibiting counsel for Ricart from examining him until he was later called in their defense of the counterclaim.

There is no doubt that Wynn Rees acted as an employee of Ricart in the scope of his duty during the time that the events that he testified about occurred. Although he has not been employed by Ricart since 1977, the trial court allowed him to be called on cross-examination because of his former relationship with Ricart.

Evid. R. 611(C) provides as follows:

"Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions."

The trial court did not abuse its discretion in applying Evid. R. 611(C), as the witness was identified with Ricart, albeit through former employment as he was Ricart's finance manager who dealt directly with Zizek during the sales transaction at issue. Since the jury was instructed to consider all testimony prior to arriving at any opinion,

there was no prejudice.

Appellant's seventh assignment of error is overruled.

Appellant asserts the trial court erred in admitting Zizek's Exhibit F which was a statement of services of counsel.

Exhibit F was a statement for attorney fees rendered Zizek in regard to Zizek's defense against the complaint of Ricart Ford for the insurance proceeds. The statement contains a detailed description of all of the functions performed by counsel in regard to defense of this action. There was no statement of the number of hours of work or hourly rate on the bill. Another attorney testified that he had examined the bill and that the charges were reasonable in conjunction with the defense of the complaint. Based upon that testimony, the trial court admitted the bill for attorney fees as an exhibit.

Appellant complains that, since the bill did not contain a statement of the number of hours or hourly rate, the exhibit was inadmissible. However, since there was a detailed description of all of the matters taken care of by the attorney, the absence of the number of hours which the attorney worked or the hourly rate went only to the weight of the evidence rather than the admissibility.

Appellant's eighth assignment of error is overruled.

Appellant finally contends that the verdict and judgment were the result of passion and prejudice inspired by misconduct of counsel.

Appellant points to a few places in the transcript where counsel for Zizek may have been somewhat over aggressive in pursuing his client's cause. However, a careful review of the record discloses that overall the trial court controlled the proceedings in a fair and equitable manner and sustained objections to improper conduct when made.

Appellant has failed to demonstrate that the jury verdict was based upon passion and prejudice occasioned by misconduct of Zizek's counsel, or that the trial court failed to properly control the proceedings.

Appellant's ninth assignment of error is overruled.

Appellant's assignments of error are overruled and the judgment of the trial court is affirmed.

Judgment affirmed.

MOYER and NORRIS, JJ., concur.

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