RECEIVED
Aug 07 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

S.C. Court of Appeals Case No. 2022-001795
Circuit Court Case No.2019CP10-05392

KEVIN STAVELEY-O'CARROLL, Appellant,

v.

FENIX AUTOMOTIVE, LLC, Respondent.

INITIAL BRIEF OF RESPONDENT

Damien A. Sobieraj, Esquire
S.C. Bar ID No. 71760
COOPER RIVER LEGAL SERVICES, LLC
P.O. Box 2439
Mt. Pleasant, South Carolina 29465
Telephone: (843) 881-2244
Facsimile: (843) 849-0209
Email: damien@cooperriverlegalservices.com
ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

1. The trial court's findings of fact are reasonably supported by the evidence.

The trial court shall measure exclusively the credibility and weight of the evidence presented to it, and the appellate court shall "construe [this] evidence…so as to support [the trial court's] decision wherever reasonably possible." Regions Bank v. Strawn, 399 S.C. 530, 537, 732 S.E.2d 230, 234 (Ct. App. 2012) (citing Sheek v. Crimestoppers Alarm Sys., 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct. App. 1989)); *See also* Hanna v. Palmetto Homes, Inc., 389 S.E.2d 164, 165, 300 S.C. 535, 537 (Ct. App. 1990) ("In a law case, the credibility and weight to be accorded evidence is solely for the fact finder to determine.").

At the damages hearing, only the Appellant presented evidence in the form of photographs and witness testimony because Respondent was in default.[1] Appellant was the first witness to testify at the hearing. [See Transcript p.5:17 through p.32:15]. During direct examination, Appellant testified the 1969 Mercedes 280 SL ("Mercedes") "was in very good shape." [See Transcript p.9:7]. However, Appellant testified that "In the early 2000's in Pennsylvania it had a cracked head, so we weren't able to drive it…" [See Transcript p.9:8-9]. He further testified during cross-examination that when he delivered the Mercedes to Respondent it was not running and "had a cracked head…." [See Transcript p.16:8-12]. Appellant's testimony is contrary to his allegation in the Complaint in which he stated the Mercedes was running. [See Plaintiff's Complaint p. 3, footnote 1].[2]

[1] The trial court instructed the parties that only the plaintiff could introduce evidence at the hearing and defendant could only object to such evidence and cross-examine the witness. Respondent did not object to this evidentiary limitation at the hearing and does not appeal this matter of law. [Transcript p.6: lines 4-14].

[2] Appellant stated in Complaint "At the time Plaintiff delivered the Mercedes to Fenix, the vehicle was in running condition."

Also, during direct examination, Appellant testified that he was "looking for someone that could restore the cracked head and really, make the car in perfect condition." [See Transcript p. 9:10-11]. In his Complaint, Appellant stated he came into possession of the Mercedes in 2015 "which he desired to have restored to its original condition." [See Plaintiff's Complaint pp.1-2, para. 5].[3] But, during cross-examination, Appellant testified that he contracted with Respondent for restoration of the Mercedes "to an everyday driver condition" and not "perfect or showroom quality." [See Transcript p. 17:2-9]. In any event, Appellant did not introduce into evidence any photographs of the Mercedes showing its original condition or any other condition of the vehicle up to and including when Appellant delivered it to Respondent, but rather, Appellant only presented the trial court with photographs of the Mercedes after Respondent had disassembled and begun work on the vehicle. [See Plaintiff's Exhibits 3(pp.3-6), 11.1, 11.2, and 12.1 through 12.8].

Appellant's only other witness was Axel Reinert who the court accepted as an expert witness without objection by Respondent. [See Transcript p.33:5 through p.90:17]. During direct examination, Mr. Reinert admitted he had not "personally inspected" the Mercedes. [See Transcript p.39:8-9]. Mr. Reinert then testified to the value of the Mercedes at the time Appellant delivered it to Respondent based upon only the testimony of Appellant, his emails with Respondent, the mileage of the Mercedes, and vehicle sales at unnamed "Mercedes-Benz sites" and online auctions, that value being about $42,000. [See Transcript p. 39: 13 through p.42:20]. Mr. Reinart confirmed he did not see the Mercedes or the condition it was in, neither in pictures nor in person, when it arrived at Respondent's shop. [See Transcript p.90:10-16]. Neither

[3] It should be noted that in accordance with Appellant's testimony, the Mercedes was not running when took possession in 2015 and had not been running from the "early 2000's."

Appellant nor Mr. Reinart provided any documentation or photographs of comparable vehicles and their conditions, either before or after restoration.

During cross-examination, Mr. Reinert was questioned about whether the value of the Mercedes at the time Appellant delivered the Mercedes to Respondent would change if the condition of the Mercedes had been significantly more deteriorated than what he understood it to be, and he testified that such deterioration would not diminish the value of the vehicle. [See Transcript p.77:5 through p.79:1].

Also, during direct testimony, Mr. Reinert stated the value of the Mercedes would be $115,000 had it been restored to the agreed upon condition of "driver quality." [See Transcript p.45:8 through p.48:2]. However, Mr. Reinert never identified any industry resources, nor did he present any documentation from which he gleaned the information used to form his opinion, identifying only one website. [See Transcript p.82:3, identifying Classicdriver.com]. Moreover, when cross-examined on the value of a restored "driver quality" Mercedes, Mr. Reinert admitted that a search on the internet would reveal auctions of the same Mercedes as low as $47,200. [See Transcript p.81:19 through p.84:23].

At the conclusion of the damages hearing, the trial court instructed Appellant's counsel to submit a proposed order to the trial court and Respondent's counsel containing arguments for what Appellant wanted and why, stating Respondent's counsel would then get five days to file its response. [See Transcript p.90:23 through p.92:8]. The trial court then filed a formal order memorializing these instructions. [See Form 4 Order to Submit Proposed Order for Damages]. Appellant's proposed order consisted of a calculation for damages based upon the highest valuations as testified by Mr. Reinart. Respondent's proposed order consisted of calculation for damages based upon a range of valuations as testified by Mr. Reinart. The trial court adopted

Respondent's proposed order that is reasonably supported by the testimony of both Appellant and Mr. Reinart during direct and cross examinations. [See Order of Judgment of Damages; compare Plaintiff's Proposed Order of Judgment for Damages and Defendant's Proposed Order of Judgment for Damages].

a. The trial court's determination of the value of the Mercedes at the time Appellant delivered it to the Respondent is reasonably supported by the evidence.

Although Respondent could not present any evidence of its own to deny the allegations of Appellant nor to dispute the evidence presented by Appellant, the trial court still determines the credibility of the Appellant's witnesses and weight to afford their testimonies. *See* Hanna v. Palmetto Homes, Inc., 389 S.E.2d 164, 165, 300 S.C. 535, 537 (Ct. App. 1990). Mr. Reinart testified that the Mercedes had a value of about $42,000, but he later admitted that the Mercedes, when restored, could have a value as low as $47,200. [See Transcript p. 42:17-20 and Transcript p.84:20]. Furthermore, there are inconsistencies between the allegations in the Appellant's Complaint and his testimony at trial about the condition of the Mercedes on or before the date Appellant delivered it to Respondent. Consequently, based on all of the relevant evidence, the trial court made a proper finding that the condition of the Mercedes was less than fair and reasonably determined it had a value less than that opined by Appellant's expert Mr. Reinert. *See* Thomas Sand Co. v. Colonial Pipeline Co., 563 S.E.2d 109, 349 S.C. 402, 411 (Ct. App. 2002) ("Where expert's testimony is based upon facts sufficient to form the basis of an opinion, the trier of fact determines its probative value."); *accord* Dixon v. Besco Engineering, Inc., 320 S.C. 174, 181, 463 S.E.2d 636, 640 (Ct. App. 1995) ("The fact finder must determine the weight to be accorded the testimony of witnesses, and accept or reject their valuations.") and Diamond Swimming Pool Co. v. Broome, 252 S.C. 379, 385, 166 S.E.2d 308, 311 (1969) ("…inherent contradiction or

improbability in the witness' statements which…justify the fact finder in giving testimony less than full value.").

b. The trial court's determination of the value of the Mercedes had it been restored per the contract between Appellant and Respondent is reasonably supported by the evidence.

During cross examination, Mr. Reinert admitted that the value of the Mercedes fell within a range based upon an internet search of auction with an "average retail of $81,400." [See Transcript p.84:11-21]. While the range of amounts listed in the Order of Judgment for Damages may not reflect the full range of the amounts that Mr. Reinart testified to, the value of $81,000 assigned to the Mercedes by the trial court is reasonably supported by the evidence, specifically Appellant's own expert witness testimony. *See* Dixon v. Besco Engineering, Inc., 320 S.C. 174, 181, 463 S.E.2d 636, 640 (Ct. App. 1995) (Finding no abuse of discretion when the amount awarded was comparable to the testimony.]

c. The trial court's determination of the present value of the Mercedes is a harmless error.

While Appellant appeals the trial court's finding that the present value of the Mercedes is $10,000.00, the trial court used the value of $2,500 in the final calculation of the award of damages. [See Order of Judgment for Damages p.8, 6th line from bottom]. Respondent motioned the trial court to amend its Order of Judgment for Damages and use the value of $10,000, but the trial court denied Respondent's motion. [See Order Denying Defendant's Motion to Alter or Amend Judgment]. Respondent did not appeal this matter. Consequently, even if the finding is erroneous, Appellant has not suffered any prejudice in the calculation of damages awarded him.

d. The trial court's calculation of damages is a proper and correct judgment.

In light of all of the testimony by Appellant and his expert witness Mr. Reinert, during both direct and cross examinations, and having measured the credibility of the witnesses and determined the weight to be accorded to their testimonies, trial court properly calculated damages for each of Appellant's causes of action "because the amount awarded was comparable to such testimony." Dixon v. Besco Engineering, Inc., 320 S.C. 174, 181, 463 S.E.2d 636, 640 (Ct. App. 1995); *see also* Regions Bank v. Strawn, 399 S.C. 530, 537, 732 S.E.2d 230, 234 (Ct. App. 2012) (citing Sheek v. Crimestoppers Alarm Sys., 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct.App.1989)). Having awarded a judgment for damages in an amount reasonably supported by the evidence, the trial court did not abuse its discretion. *See* BB & T v. Taylor, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006) (citing Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990)).

CONCLUSION

The trial court's findings of fact are reasonably supported by the evidence presented at the damages hearing. Specifically, Appellant's testimony and that of his expert Mr. Reinert reasonably supported the trial court's determination of the value of the Mercedes when Appellant delivered it to Respondent and the value of the Mercedes had the restoration been completed per the contract between Appellant and Respondent. Any error in the determination of the present value of Mercedes is harmless error because the trial court used the amount Appellant contends is the correct amount, and therefore, Appellant has not suffered any prejudice by such error in the calculation of damages awarded him. Therefore, Respondent respectfully requests this Court affirm the trial court's Order of Judgment for Damages.

s/Damien A. Sobieraj
Damien A. Sobieraj, Esq.
S.C. Bar ID No. 71760
COOPER RIVER LEGAL SERVICES, LLC
P.O. Box 2439
Mt. Pleasant, South Carolina 29465
Telephone: (843) 881-2244
Facsimile: (843) 849-0209
Email: damien@cooperriverlegalservices.com
ATTORNEY FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

S.C. Court of Appeals Case No. 2022-001795
Circuit Court Case No.2019CP10-05392

KEVIN STAVELEY-O'CARROLL, Appellant,

v.

FENIX AUTOMOTIVE, LLC, Respondent.

PROOF OF SERVICE

The undersigned does hereby certify that on August 5, 2022, he served the foregoing Initial Brief of Respondent electronically to W. Westbrook Wills III, attorney for Appellant, via email addressed to wwills@wwillslaw.com.

s/Damien A. Sobieraj
Damien A. Sobieraj, Esquire
S.C. Bar ID No. 71760
COOPER RIVER LEGAL SERVICES, LLC
P.O. Box 2439
Mt. Pleasant, South Carolina 29465
Telephone: (843) 881-2244
Facsimile: (843) 849-0209
Email: damien@cooperriverlegalservices.com
ATTORNEY FOR RESPONDENT