STATE OF MICHIGAN

COURT OF APPEALS

BARBARA BOILLAT, Plaintiff-Appellee,	UNPUBLISHED May 7, 2009
v	Nos. 277916; 284848; 286024 Ingham Circuit Court
KELLY AUTOMOTIVE GROUP, INC., Defendant-Appellant.	LC Nos. 06-001430-AV, 07-001647-AV

Before: Bandstra, P.J., and Whitbeck and Shapiro, JJ.

PER CURIAM.

This case arose out of a used vehicle purchase contract between plaintiff and defendant. Plaintiff purchased a vehicle from defendant in April 2005. Thereafter, the parties rescinded the contract, although they disagree on the terms of the rescission. Plaintiff then brought suit to recover the down payment on the vehicle. In Docket No. 277916, defendant appeals by leave granted from the circuit court's affirmance of the district court's order that defendant refund the down payment and also pay attorney fees under the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*. In Docket No. 284848, defendant appeals the circuit court's affirmance of the district court's order denying defendant's motion for relief from judgment and its affirmance of the district court's award of attorney fees as sanctions to plaintiff. In Docket No. 286024, defendant appeals the award of sanctions to plaintiff from the circuit court appeal. We affirm.

According to plaintiff, she visited a salesman at Kelly Automotive Group on April 26, 2005, after seeing an ad in the paper. She allegedly told the salesman over the phone that she had $1,700 in deposit money, and explained that she could afford a car for $200 a month and "needed something with PLPD[1]" because it would be a lower cost insurance. In response, the salesman told her to bring the deposit and information about other cars that she had paid off in the past to the dealership. Plaintiff indicated that a courtesy van picked her up.

Plaintiff testified that after she arrived at Kelly Automotive, the salesman told her that he needed to take the $1,700 deposit money to his manager, Gary Kelly, to show that she was

[1] Public Liability and Property Damage.

serious about buying a car. She testified that she did not see a car before the salesman took the money and did not get a receipt at the time the money was taken.[2] Plaintiff said that the salesman showed her three or four vehicles; she decided on a truck. Plaintiff testified that the salesman told her that since it was close to closing time, she should go get insurance for the truck while he discussed the pricing of the vehicle with Gary Kelly. Plaintiff indicated that she believed the truck would be within her means.

Although plaintiff had indicated to the salesman that she wanted something with PLPD, plaintiff testified that defendant told her she was required to have full coverage on the truck. The cost of the full coverage insurance was $150 per month—almost the entire amount plaintiff had told the salesman she had available for her car payment. Plaintiff stated that after she returned from getting insurance, she told the salesman "it's higher than I wanted to pay," to which he replied that he would make the payments affordable even though she had gotten full coverage rather than PLPD. The salesman informed her that after applying her $1,700 down payment, the balance due on the truck was $4,852.60. She thought that paying that amount off over a period of 30 months was "doable" for her, because she calculated it to be about $160 per month.

Plaintiff was then taken to a different building where the financing is done, and she met with Melanie Pulver. Plaintiff testified that when she received the installment contract from Pulver, everything had changed and the total price for the vehicle was $10,213.70. Plaintiff was told that the added items on the installment contract were mandatory, including gap insurance and a service warranty, and that she could not leave the lot with the truck unless these items were part of the contract. Plaintiff noted that the interest rate on the truck was 25 percent. Plaintiff said that she started to have a panic attack and told Pulver that she could not afford the truck at that price. Plaintiff testified, "I told her no, I said no, I cannot do this, no, something's wrong here." Plaintiff said that Pulver "jumped up and ran out of the room" and that the salesman came back in. Plaintiff also told him that she could not afford the truck and that it was not what they had agreed on. Plaintiff said that the salesman told her not to focus on how expensive the car was, "focus on what I'll be able to get you into, which is anything you want on this lot. [And?] look what it'll do for your credit." The monthly cost of the truck was $283 plus the $150 for the full coverage insurance, for a total of $433—more than double what plaintiff initially indicated she could afford.

Plaintiff testified that she asked about taking the shuttle home and was told that all the shuttles had gone home for the day. The salesman said that he was late for dinner, and Pulver indicated that she was going the other way and could not drop plaintiff off either. Plaintiff testified that she told them she needed to get home and that she did not want the truck and that, if there had been a bus, or someone she could call, she "would have walked out with my kids and left." Plaintiff indicated that she signed the contract because she did not have any other way home and she did not have any other choice.

---

[2] He apparently gave her a receipt about an hour and a half later.

Plaintiff testified that when she got home she was "really upset" and that she "got right on the phone and tried to work things out" with defendant's owner, Russ Kelly, about the truck purchase, but was only able to leave messages for him. After Russ Kelly did not return the calls, plaintiff "asked [if?] there was anybody else" and was told she could talk with Russ's son, Gary Kelly. Plaintiff testified that, because she also received no return calls from Gary Kelly, the first week of May she drove down to the business and met with Gary Kelly. Only Gary Kelly and plaintiff were present at this meeting. According to plaintiff, she told him that she did not want the truck and that she could not afford it. She testified that she offered to take the deposit and "move on to something that was affordable," or, if that not feasible, at a minimum that she wanted the extra charges removed, including the gap insurance and the service warranty protection plan, because another dealership had informed her that those were not mandatory items. Plaintiff said that Gary Kelly told her that she signed the contract and that he could not remove the extra items.

Plaintiff said that sometime in the next three weeks, she and Julie Johnsonbaugh, a helper from her church, met with Gary Kelly. Plaintiff explained to Gary Kelly that her child support payments had dropped and that she could not even afford to pay for utilities and telephone; she asked to be let out of the contract. According to plaintiff, Gary Kelly told her that he would rescind the contract; that he could make it as if it never was; that he would tear up the contract; and, if she wanted to purchase another car, that he would take the down payment and put it toward the other car. Plaintiff understood the conversation to mean that Gary Kelly would get the truck and plaintiff would get the down payment back. At the end of the meeting, plaintiff informed Gary Kelly that she had decided not to purchase another vehicle from Kelly Automotive Group.

Johnsonbaugh testified that Gary Kelly told her twice that he would rescind the contract with plaintiff and that, although he initially indicated he would have to get back with her on whether plaintiff would get her down payment back, he later indicated plaintiff would receive her down payment back, minus approximately $400 for taxes paid on the truck. Soon after Gary Kelly said this, Johnsonbaugh said she told plaintiff that it was not right and then the two of them left. She also testified that the second time Gary Kelly stated he would rescind the contract, she did not understand the rescission to be conditional on plaintiff purchasing another vehicle from defendant.

Plaintiff said that her next contact with Gary Kelly was when she came back with Johnsonbaugh and returned the truck on June 11. Plaintiff testified that it was at this meeting that Gary Kelly informed her that he would not be giving her the deposit back and that he may be suing her. Plaintiff said that she was not sued, but that her credit report incorrectly showed a balance due of $6,258. Plaintiff indicated that because of her credit report she has been unable to finance another car and she has had to rent a car on four occasions.

Plaintiff initially filed her complaint in small claims court. After the case was heard by a magistrate, plaintiff timely appealed the ruling pursuant to MCR 4.401(D). However, prior to the de novo hearing by the district court judge sitting in small claims, defendant hired counsel who appeared and requested removal to the district court. In light of the pending appeal of the magistrate's ruling, the district court agreed to defendant's request for removal. The district court relied, in part, on MCR 4.306(A)(2) which allows a party to remove from small claims to the district court by "appearing before the court at the time and place set for hearing and

demanding removal." The district court concluded that because defendant's counsel appeared and requested removal at the time and place set for the de novo hearing, the request fell within the rule.[3] Plaintiff filed an amended complaint[4] in the district court, alleging a violation of the MCPA, common law fraud, and ordinary negligence. After the bench trial in district court, the district court concluded that defendant's failure to return plaintiff's down payment was a violation of the MCPA and ruled in plaintiff's favor.[5] Defendant appealed to the circuit court, which affirmed. Defendant then requested leave to appeal to this Court, which was granted. *Boillat v Kelly Automotive Group, Inc*, unpublished order of the Court of Appeals, entered October 16, 2007 (Docket No. 277916).

While defendant's application for leave was pending, our Supreme Court decided *Liss v Lewiston-Richards, Inc*, 478 Mich 203; 732 NW2d 514 (2007). Defendant filed a motion for relief from judgment in the district court, arguing that under *Liss*, the MCPA was inapplicable to plaintiff's claim. The district court denied defendant's motion, relying on the statement in *Liss* that the exemption to the MCPA is an affirmative defense and noting that defendant never raised the defense. See *Liss, supra* at 208 n 13. Apparently, a dispute arose over the proposed order and an additional hearing was required. The district court awarded plaintiff sanctions, concluding that defendant was unnecessarily drawing out the proceedings to disadvantage plaintiff. Defendant requested leave to appeal to the circuit court, which was denied. Defendant requested reconsideration, which was also denied. Plaintiff moved for attorney fees under both MCPA and as sanctions under MCR 2.114. The circuit court awarded plaintiff sanctions under MCR 2.114, concluding, as had the district court, that defendant was simply attempting to disadvantage plaintiff. Defendant requested leave to appeal both the circuit court's affirmance of the district court's order and the circuit court's award of sanctions, which this Court granted, consolidating all three appeals. *Boillat v Kelly Automotive Group, Inc*, unpublished order of the Court of Appeals, entered August 28, 2008 (Docket No. 284848); *Boillat v Kelly Automotive Group, Inc*, unpublished order of the Court of Appeals, entered August 28, 2008 (Docket No. 286024).

---

[3] Plaintiff's counsel did not appear based on her understanding that attorneys were not permitted to appear in small claims court. However, in light of defendant's filing an appearance on behalf on defendant and notifying plaintiff of his intent to appear, plaintiff counsel sent a letter to the district court requesting a modification or vacation of the small claims judgment, or consolidate the small claims case with plaintiff's additional claims in the district court under the Michigan Consumers Protection Act, MCL 445.901 *et seq.* (MCPA).

[4] There appears to be no original complaint other than the small claims complaint. We assume it is listed as amended because it alleges additional counts not brought in the small claims case.

[5] The district court specifically did not make any factual findings or reach any conclusions as to plaintiff's common law fraud or ordinary negligence claims. The trial court also focused only on plaintiff's rescission argument and, therefore, a violation under MCL 445.903(1)(u). However, plaintiff had other claims under the MCPA that the trial court did not address, including MCL 445.903(1)(a), (m), (n), (o), (s), (w), (x), (y), (aa) and (bb).

Defendant first argues[6] that its removal of the action from the small claims division to the district court should have been denied because removal was sought after the small claims magistrate issued a ruling. Defendant also argues that plaintiff's motion to modify or vacate the small claims order, or in the alternative to consolidate it with the district court case, should have been denied because to do so would go against the spirit of the waiver signed by both parties. We disagree. We review de novo the court's conclusions of law. *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001), citing MRC 2.613(C) and *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

Preliminarily, even if the removal was not effective, there was no jurisdictional issue with plaintiff raising a second cause of action directly in the district court regarding whether defendant violated the MCPA because the compulsory joinder provision of MCR 2.203(A) does not apply to cases brought in the small claims division of the district court. *Kaiser v Smith*, 188 Mich App 495, 499; 470 NW2d 88 (1991). However, under the circumstances of this case, we conclude that the district court also had jurisdiction over the claim for return of plaintiff's deposit. Plaintiff appealed the decision of the small claims division magistrate to the district court pursuant to MCR 4.401(D). On the date of the appeal hearing, defendant appeared through counsel, which is not permitted in small claims, MCR 4.301; MCL 600.8408(1), and removed the action, such that the de novo small claims hearing never occurred. Defendant now argues that removal was inappropriate. We find that defendant is precluded from making this argument on appeal given that it was on defendant's request that removal occurred. "A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court." *Czymbor's Timber, Inc v Saginaw*, 269 Mich App 551, 556; 711 NW2d 442 (2006). Additionally, although the removal was clearly precipitated by defendant improperly bringing counsel to a small claims case, given that both parties essentially asked for removal,[7] we deem the removal to be an implicit stipulation to vacate the magistrate's order. "A party cannot stipulate to a matter and then argue on appeal that the resultant action was error." *Chapdelaine*, *supra* at 176. Accordingly, defendant is entitled to no relief.

Defendant next claims[8] that its motion for relief from the MPCA judgment should have been granted based on the Supreme Court's opinion in *Liss v Lewiston-Richards, Inc*, 478 Mich 203; 732 NW2d 514 (2007). We review a trial court's ruling on a motion for relief from judgment for an abuse of discretion, and we may only set aside a trial court's findings of fact if

---

[6] We address defendant's arguments in the order that seems most rational, although not in the same order as defendant raised them. We have used footnotes to indicate to which docket number each claim belongs. This first claim is from Docket No. 277916.

[7] Plaintiff filed a motion to modify or vacate the small claims judgment, or alternatively to consolidate it with the district court case the same day that defendant asked for the removal, although it is unclear from the record which was filed first, as neither document has a filing stamp or appears on the docketing statement in the district court record.

[8] Docket No. 284848.

they are clearly erroneous. *Dep't of Environmental Quality v Waterous Co*, 279 Mich App 346, 364; 760 NW2d 856 (2008).

The MCPA includes an exemption for any "transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." MCL 445.904(1)(a). Under MCL 445.904(4), this exemption can be claimed as an affirmative defense, but as with all affirmative defenses, if not timely pled in the first responsive pleading, an amended pleading, or in a motion for summary disposition, the exemption is waived. MCR 2.111(F)(3). In *Liss*, *supra* at 206-207, the plaintiffs filed an action against the defendant-residential builder for a violation of the MCPA. The defendant asserted that its residential-home-building transaction with the plaintiffs was exempt. *Id*. at 207. The Court held that a general transaction specifically authorized by law could consist of a license and regulation from a state or federal government. *Id*. at 213. The Court reasoned that contracting to build a residential home was specifically authorized by law under the Michigan Occupation Code (MOC) and regulated by the Residential Builders' and Maintenance and Alteration Contractors' Board, which oversees licensing and handles complaints filed against residential home builders. *Id*. Therefore, the defendant's general conduct of residential home building was exempt from the MCPA because defendant was licensed and regulated.

Defendant argues that the sale and financing of a motor vehicle is governed by federal and state law, and that all auto dealerships must be licensed by the state in order to sell new or used vehicles under MCL 257.248(5). We need not decide this issue. Unlike in *Liss*, the argument that defendant is exempt from the MCPA was not timely raised as an affirmative defense. We reject defendant's contention that this affirmative defense was adequately pled because it stated a failure-to-state-a-claim-upon-which-relief-could-be-granted defense. MCL 445.904(4) specifically places the burden of proving an exemption from the MCPA on the person claiming the exemption. Moreover, as stated in *Liss*, the MCPA exemption under MCL 445.904(1)(a) is an affirmative defense, which is waived unless the party asserting it raises it in the party's first responsive pleading or a motion for summary disposition. See MCR 2.111(F)(3).

Defendant's claim that, until *Liss* there was no defense, is meritless. The exemption is statutory, not judicially created and, therefore, preexisted *Liss*. Indeed, our Supreme Court noted that the defendant in *Liss* specifically pleaded that the MCPA was inapplicable:

> Thus, § 4(1)(a) provides an affirmative defense, which is waived, unless the party raised it in the party's first responsive pleading, as originally filed or as amended under MCR 2.118, or motion for summary disposition. . . . Defendants properly raised the exemption in their answer and counterclaim, as well as in their motion for summary disposition. [*Liss*, *supra* at 208, n 13.]

Defendant had the same opportunity to raise the exemption as did the defendants in *Liss*, but did not exercise that opportunity. Defendant's claim that its failure to raise the defense should be excused because it was under no obligation to file affirmative defenses given that the claim was first raised in small claims court is not well taken. Defendant managed to claim other specific defenses, such as the UCC, evidencing its ability to claim defenses should it have found them applicable. This is not a case where defendant raised the defense in a subsequent pleading and the court made the determination that it was not raised timely. This is a case where defendant

failed to raise the defense entirely until the case was awaiting a grant of leave for its second level of appellate review. Defendant failed to raise the affirmative defense and, therefore, waived it. There is no error.

Defendant next argues[9] that the district court erred in finding that the failure of Gary Kelly, a nonparty, to respond to a request to admit established a rescission. The trial court concluded in its opinion that:

> The contract between plaintiff Barb Boillat (Ms. Boillat) and defendant Kelly Automotive Group (Kelly) was rescinded. This fact was supported at trial through the testimony of Ms. Boillat and Ms. Johnsonbaugh. It is proven conclusively by defendant Kelly's admission # 5.a.

We review a trial court's decision regarding evidentiary issues, such as admissions under MCR 2.312, for an abuse of discretion. *Hilgendorf v St. John Hosp & Med Ctr Corp*, 245 Mich App 670, 688; 630 NW2d 356 (2001).

According to MCR 2.312(B)(1), "[e]ach matter as to which a request is made is deemed admitted unless, within 28 days after service of the request . . . the party to whom the request is directed serves on the party requesting the admission a written answer or objection addressed to the matter." "A matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of an admission." MCR 2.312(D)(1); *Employers Mutual Casualty Co v Petroleum Equip Inc*, 190 Mich App 57, 62; 475 NW2d 418 (1991). However, MCR 2.312 provides that a request for admission may only be served *by* parties *on other* parties.

Even so, we need not make a determination regarding Gary Kelly's status as a nonparty or an agent. Although the district court referenced admission #5.a, which was a question regarding rescission sent to Gary Kelly, the trial court referred to it as "defendant Kelly's admission." Defendant was also sent requests for admission by plaintiff that went ignored. Admission #6.a was, "Do you admit that this contract was rescinded, cancelled or otherwise terminated by you/Gary Kelly?" Thus, given that the trial court referred to "defendant's" admission, it seems likely that the reference to question #5.a was simply a clerical error.

Defendant did not make a motion to permit withdrawal and there was no response to the request for admission for defendant to amend. Therefore, defendant is deemed to have admitted that the contract between plaintiff and defendant was rescinded, cancelled, or terminated. See *Medbury v Walsh*, 190 Mich App 554, 556; 476 NW2d 470 (1991). Consequently, even if the trial court's reference to question #5.a was intentional, we conclude that the trial court reached the right outcome, albeit for the wrong reason, and affirm. *Hess v Cannon Twp*, 265 Mich App 582, 596; 696 NW2d 742 (2005).

---

[9] Docket No. 277916.

Defendant further argues that even if the contract was rescinded, defendant did not violate MCL 445.903(1)(u). MCL 445.903(1)(u) provides that "[f]ailing, in a consumer transaction that is rescinded . . . in accordance with the terms of a . . . representation . . . to promptly restore to the person or persons entitled to it a deposit, down payment, or other payment" is an unlawful act under the MCPA. Defendant first argues that no representation was made. This is disingenuous, as the record reveals that both plaintiff and Johnsonbaugh testified that Gary Kelly stated that he would rescind the contract with plaintiff and made a motion like he was tearing up the contract.

Defendant also argues that plaintiff was not entitled to a refund of her down payment because defendant never agreed to return it. The trial court found that the rescission of the contract entitled plaintiff to a refund of her down payment, stating:

> Michigan law requires the return of deposited funds on rescission of a contract. Rescission of a contract is not merely a release; the contract is annulled from the beginning and the parties are restored to the positions they would have occupied if there had been no contract.

In *Lash v Allstate Ins Co*, 210 Mich App 98; 532 NW2d 869 (1995), this Court discussed contract rescission, stating:

> To rescind a contract is not merely to terminate it, but to abrogate and undo it from the beginning; that is, not merely to release the parties from further obligation to each other in respect to the subject of the contract, but to annul the contract and restore the parties to the relative positions which they would have occupied if no such contract had ever been made. Rescission necessarily involves a repudiation of the contract and a refusal of the moving party to be further bound by it. But this by itself would constitute no more than a breach of the contract or a refusal of performance, while the idea of rescission involves the additional and distinguishing element of a restoration of the *status quo.* [*Id*. at 102-103, quoting *Cunningham v Citizens Ins Co of America*, 133 Mich App 471, 479, 350 NW2d 283 (1984) (emphasis in original).]

In order for defendant to restore plaintiff to the status quo and put her in the position she would have been if no contract ever existed, defendant would have to refund plaintiff her down payment. Accordingly, the rescission of the contract entitled plaintiff to a refund, regardless of whether defendant specifically agreed to return it as a condition of the rescission. Because the record supports that there was a rescinded consumer transaction and plaintiff was entitled to have her deposit refunded, we find no error in the trial court's conclusion that under MCL 445.903(1)(u), defendant's failure to refund plaintiff's deposit was a violation of the MCPA.

Defendant next argues[10] that this Court should vacate or reduce the award of attorney fees granted to plaintiff under the MCPA. We review the trial court's decision to award attorney fees for an abuse of discretion. *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 422; 668 NW2d 199 (2003).

The award of damages under the MCPA is discretionary. The trial court abuses its discretion where it chooses an outcome falling outside a range of principled outcomes. *In re Baldwin Trust*, *supra*, 274 Mich App at 397. Here, the trial court reviewed the attorney fees and heard objections from defendant on both the rate and the amount of time spent preparing this case for trial. The trial court considered legal resources to determine the appropriate hourly rate, and reduced the hours charged, as well, resulting in a 37.5% percent reduction from plaintiff's original request. Additionally, we note that this defendant has previously engaged in similar conduct. That is, defendant takes claims filed in district court and appeals them up to the Supreme Court, thereby increasing attorney fees and costs to the plaintiff, and then argues that the attorney fees are "disproportionate to the amount involved and the results obtained." See *Beach v Kelly Automotive Group, Inc*, 482 Mich 1101; 757 NW2d 868 (2008). We refuse to permit defendant to run up the cost of litigation by exercising its right to appeal and then argue that plaintiff should not be entitled to the increased fees defendant's actions created. See *id.* ("I believe that the circuit court and the district court expressly and properly attributed the extraordinary fees to defendant's conduct" [Young, J., concurring]). Under these circumstances, we find that this result was reasonable, and that it was within the range of principled outcomes; the trial court did not abuse its discretion.

Defendant's final argument[11] is that the district court erred in awarding sanctions to plaintiff and the circuit court erred in allowing that award to stand, and in awarding additional sanctions. We review a trial court's decision whether to impose sanctions under the clearly erroneous standard. *Schadewald v Brule*, 225 Mich App 26, 41; 570 NW2d 788 (1997).

The district court did not state a basis for its award of sanctions to plaintiff. The circuit court determined that the award was clearly under MCR 2.114. The circuit court also awarded sanctions against defendant under MCR 2.114 because it concluded that defendant's continued appeals were filed for an improper purpose "such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." MCR 2.114(D)(3).

Although we are concerned by what appears to be defendant's needless increase of litigation costs against plaintiff, we do not believe that defendant's appeal based on *Liss* was without merit. Parties are entitled to raise questions of the application of new precedent to their cases. In light of the fact that the application of *Liss* in the context of automotive sales has yet to be determined, we do not believe defendant had a completely insupportable position or that the outcome was "crystal clear." Accordingly, we find that sanctions were inappropriate.

---

[10] Docket No. 277916.

[11] Docket Nos. 284848, 286024.

However, in both cases where sanctions were awarded, plaintiff had also moved for her attorney fees under the MCPA. Because all of defendant's continued appeals and new proceedings stemmed from the MCPA action, plaintiff was entitled to those attorney fees, MCL 445.911(2); *Lavene v Volkswagen of America, Inc*, 266 Mich App 470, 477; 702 NW2d 652 (2005), even if the trial court improperly awarded them as sanctions. Because the trial court reached the right result, albeit for the wrong reason, we affirm the award of plaintiff's attorney fees. *Hess, supra*.

Affirmed. Pursuant to MCR 7.219, plaintiff is entitled to costs.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck
/s/ Douglas B. Shapiro