

UNREPORTED CASES

Not Reported in N.E.2d, 1990 WL 72607 (Ohio App. 10 Dist.)

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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin County.
Nancy HEMPY, Plaintiff-Appellee,
v.
James D. GREEN, Defendant-Appellant.
No. 89AP-1369.
May 31, 1990.

Appeal from the Franklin County Court of Common Pleas.
Crabbe, Brown, Jones, Potts & Schmidt, and James A. Meaney, for appellee.
David P. Reiser, for appellant.

OPINION

McCORMAC, Judge.

*1 Defendant-appellant, James D. Green, and plaintiff-appellee, Nancy Hemy, were co-workers at the Anheuser-Busch brewery for a number of years prior to the summer of 1983. It appears that appellant and his wife were experiencing marital problems and appellant asked appellee if she would go out with him after work one evening. Appellee accepted, fully aware that appellant was married and had children. The relationship blossomed, culminating in a proposal of marriage around Labor Day 1983, contingent upon appellant obtaining a divorce.

In October, appellant informed his wife that he wanted a divorce. As part of the terms they discussed to end their marriage, appellant's wife requested \$6,000 in cash along with other considerations. At the time, appellant did not have the cash necessary to meet his wife's demands and approached appellee with his dilemma. After several weeks of deliberation, appellee borrowed money from her credit union, withdrew savings and wrote a check to appellant for \$5,800 in January 1984. Appellant, in turn, gave \$6,000 to his wife and they were later divorced.

After the divorce was finalized, appellant continued to live with his now ex-wife. He cited concern for his son's well-being and how his children would be affected by his wife's unsuccessful attempt at suicide prior to the finalization of the divorce as his reasons. Appellant broke off his engagement to appellee out of concern for his children. Sometime thereafter, appellee demanded the return of her money. When payments were not forthcoming, appellee obtained counsel and instituted this action. The case was initially filed in the Franklin County Municipal Court, but after appellant filed a counterclaim in excess of the municipal court's jurisdictional limits, it was transferred to the court of common pleas. Pursuant to Civ.R. 53, the matter was referred to a referee who, after conducting an evidentiary hearing, left the employment of the court without rendering a report and recommendation. A second referee assumed responsibility for the file and rendered findings of fact and conclusions of law based upon a reading of the file and transcript of proceedings. No objections were filed by either party and the trial court adopted the referee's report and entered judgment for appellee.

Appellant appeals and raises the following assignments of error:

"1. THE MUNICIPAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT UPON PLAINTIFF'S COMPLAINT.

"2. THE JUDGMENT OF THE COURT OF COMMON PLEAS IS CONTRARY TO LAW.

"3. THE TRIAL COURT ERRED IN ADOPTING THE REPORT AND RECOMMENDATION OF A REFEREE WHO HAD NOT PRESIDED OVER THE TRIAL OF THE CASE AND HAD NOT SEEN AND HEARD THE WITNESSES."

Appellant's third assignment of error involves a procedural matter which will be addressed prior to reaching the merits of his appeal. The issue presented is whether a successor-referee, who is not

present for the evidentiary hearing, may render a report and recommendation based upon his review of the file and transcript of proceedings.

*2 A referee's report submitted pursuant to Civ.R. 53 is merely a recommendation and does not become a final judgment until after the court has reviewed the report, along with any objections filed by the parties, and reached its own independent conclusion. Ivywood Apts. v. Bennett (1976), 51 Ohio App.2d 209. For this reason, it is incumbent upon the party claiming error to file objections to the referee's report within the time prescribed by Civ.R. 53(E). The referee's recommendation is not binding upon the trial court. Therefore, if a party does not bring complaints to the court's attention, the court may presume procedural regularity. By not filing objections, appellant has effectively waived his right to complain of the handling of his case at the referee level.

Appellant supports his argument by citing Welsh v. Brown-Graves Lumber Co. (1978), 58 Ohio App.2d 49, for the proposition that a successor-trial judge errs by rendering final judgment based upon a transcript alone when the credibility of witnesses is at issue. In Welsh, the court found that, if credibility was an issue, a new trial was mandated but, if credibility was not an issue, then the procedures followed were proper. To come within the scope of Welsh, it is necessary for appellant to point out specific instances where credibility was put into issue. Appellant has failed to do so and, without a transcript, this court is unable to search for instances which would lend credence to appellant's argument. Furthermore, it appears that the facts of this action are largely undisputed. This conclusion is buttressed by the failure of any party to object to the referee's findings of fact, which itself precludes assigning as error the trial court's adoption of the referee's findings of fact. Civ.R. 53 (E)(6). Therefore, the facts as found by the referee and trial court are not in dispute in this appeal which forecloses any issue of credibility and makes appellant's reliance on Welsh unfounded.

Appellant's third assignment of error is overruled.

By his second assignment of error, appellant contends that the trial court's judgment was contrary to law. Appellant argues that the contract between appellant and appellee was void as a matter of public policy because it was a contract in derogation of marriage. Appellee counters by pointing out that the trial court found no contract but rendered judgment on the equitable theory of unjust enrichment.

Continuing, appellee claims that since no contract was found appellant's argument must fail. It is this court's conclusion that, under either a legal or equitable theory, appellant's assignment of error should be sustained.

The referee's report supports appellee's contention that the trial court entered judgment on a theory of unjust enrichment. Unjust enrichment is an equitable doctrine which prohibits a party from retaining a benefit at the expense of another when retention would be unjust. McClanahan v. McClanahan (1946), 79 Ohio App. 231. The equally applicable equitable doctrine of "unclean hands"

has been advanced by appellant to counter appellee's argument. As the Supreme Court has stated: *3 " * * * 'He who comes into equity must come with clean hands,' requires only that the plaintiff must not be guilty of reprehensible conduct with respect to the subject-matter of his suit." Kinner v. The Lake Shore & Michigan Southern Ry. Co. (1904), 69 Ohio St. 339, paragraph one of the syllabus, cited with approval in Goldberger v. Bexley Properties (1983), 5 Ohio St.3d 82.

In the present action, both parties are guilty of reprehensible conduct which precludes appellee from claiming clean hands. Throughout the entire course of her relationship with appellant, appellee knew that appellant was married and had children. Even with this knowledge, appellee continued to engage in her affair which she knew would be disruptive of an existing marriage. Eventually, appellee accepted a proposal of marriage from a man who was already married and facilitated the breakup of his existing marriage by providing the money necessary for him to obtain a divorce. There has been no showing that appellee was fraudulently coerced into giving appellant the money. Had this been the case, the situation would be different. Appellee was equally guilty of violating the bonds of marriage and, as such, does not come to equity with clean hands. Equity is based upon what is perceived as just under the circumstances of each case and, when both parties are guilty of injustice, a court of equity will leave them as they are.

While in recent years courts have been less inclined to speak of the sanctity of marriage, it remains " * * * a basic social institution of the highest type and importance, in which society at large has a vital interest." Holloway v. Holloway (1935), 130 Ohio St. 214, 216. The notion that constraints on marriage, of whatever kind, should be declared void appeared as early as the civil law of Rome and reflected a desire to maintain a young and growing population in order to provide recruits for an expanding military. In England, as well as in this country, the idea of judicial support for marriage was continued as an institution for the preservation of morals. See Winters v. Miller (1970), 23 Ohio Misc. 73. In modern times, marriage has come to mean more than continued procreation or moral

integrity between spouses but has become a foundation for the education of our children in order to secure a productive, competitive, and socially responsible adult population. Our independent review has failed to find any case that has reversed the long standing policy of this state in favor of the preservation of the marriage bonds. Both appellant and appellee's conduct was directly contrary to this well-established public policy and thus, a court of equity should refuse to provide a forum for relief when both parties have willfully acted in derogation of this important public policy. In this instance, the courts do not attempt to decide which party was the more reprehensible, but simply leaves the parties in the position in which their conduct placed them.

*4 Our result would be unchanged if we were to agree with appellant and conclude that a contract or a conditional gift was the basis for the advancement of the money. Our review has found a multitude of Ohio cases standing for the proposition that a contract in derogation of marriage, or one that encourages divorce, is void as against public policy. *King v. King (1900)*, 63 Ohio St. 363; *Saslow v. Saslow (1957)*, 104 Ohio App. 157; *Lyons v. Lyons (1965)*, 2 Ohio St.2d 243, overruled on other grounds, *Shearer v. Shearer (1985)*, 18 Ohio St.3d 94. *Shearer* represents a recent manifestation of Ohio's policy in favor of promoting marital harmony. As part of its holding abolishing interspousal immunity in negligence actions, the Supreme Court stated:

"We conclude that the preservation of marital harmony is better served by allowing the negligent spouse, who in this day and age has more likely than not purchased liability insurance to compensate those whom he injures, to provide for his injured spouse, than by denying compensation for the spouse's suffering because of fear for the harmony of the marital unit." *Shearer, supra*, at 98. While it may be a policy as old as ancient Rome, the preservation of marital unity continues to be a persuasive concept in modern jurisprudence. Undoubtedly, it could be argued, with no small degree of force, that appellant owes a moral duty to repay appellee the \$5,800 sum. Nevertheless, the existence of a moral duty does not necessarily mean that there exists an enforceable legal duty to perform the same act. However, characterized, there was no duty, enforceable at law or equity, that can be used to obtain payment of the money advanced to appellant to enable him to obtain a divorce to marry appellee. The trial court erred in concluding otherwise.

Appellant's second assignment of error is sustained.

Finally, appellant assigns as error the municipal court's failure to grant his motion for summary judgment. For the reasons previously stated, the court erred in overruling the motion for summary judgment since the deposition of appellee that was filed in support of the motion established the nature of the claim. There was no genuine issue of material fact.

Appellant's first assignment of error is overruled. Appellant's second and third assignments of error are sustained. The judgment of the trial court is reversed and the case is remanded to the trial court to enter final judgment for appellant.

Judgment reversed and case remanded.

YOUNG and GERKEN, JJ., concur.

GERKEN, J., of the Hocking County Common Pleas Court, sitting by assignment in the Tenth Appellate District.

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Not Reported in N.E.2d, 2000 WL 697453 (Ohio App. 9 Dist.)

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Ninth District, Summit County.
Theresa OSTRANDER, Appellant,

v.

Michael ANDREW, dba MAC EXCHANGE, Appellee.

Appellee

No. 19833.

May 31, 2000.

Dated: May 31, 2000

Appeal From Judgment Entered In The Court Of Common Pleas County Of Summit, Ohio, Case No. CV 99 04 1666.

Thomas C. Loepf, Attorney at Law, Stow, OH, for Appellant.

Terry L. Bower, Attorney at Law, Akron, OH, for Appellee.

DECISION AND JOURNAL ENTRY

BATCHELDER.

*1 Appellant, Theresa Ostrander, appeals the entry of summary judgment against her by the Summit County Court of Common Pleas. We affirm.

Construing the facts in a light most favorable to the non-moving party, Ms. Ostrander brought a computer to Michael Andrew, doing business as Mac Exchange, appellee, for repair. Mr. Andrew estimated that it would be prohibitively expensive to repair the computer, costing several thousand dollars. Ms. Ostrander then sold the broken computer to Mr. Andrew for \$200. On April 15, 1999, Ms. Ostrander purchased a computer from Mr. Andrew, which Mr. Andrew represented to be new. She purchased the computer using a check drawn on the account of Old Forge Services Company ("Old Forge"), which was listed as the purchaser on the sales receipt. Thereafter, Ms. Ostrander learned that the computer was used and that the old computer could have been fixed for \$200, substantially less than Mr. Andrew had said repairs would cost. A letter was sent by an attorney representing Old Forge to Mr. Andrew, complaining of his actions. Furthermore, Ms. Ostrander alleges that Mr. Andrew falsely represented himself to Ms. Ostrander as an authorized retailer of Macintosh Computers. On April 28, 1999, Ms. Ostrander filed suit seeking damages under R.C. 1345 *et seq.* for the unconscionable, unfair, and deceptive acts committed by Mr. Andrew and alleging that Mr. Andrew's acts caused \$12,000 in actual damages. She also sought treble damages pursuant to R.C. 1345.09. She further asserted claims for breach of contract, fraud, and negligent misrepresentation, as well as claims for punitive damages in each instance. On August 27, 1999, Mr. Andrew filed a motion for partial summary judgment as to Ms. Ostrander's claims under R.C. 1345 *et seq.* and the punitive damage claims that were based on her status as a consumer. On October 1, 1999, the trial court entered partial summary judgment in favor of Mr. Andrew. Ms. Ostrander dismissed her remaining claims without prejudice, and the trial court issued an order stating that there was no just reason for delay on October 14, 1999. This appeal followed.^{FN1}

^{FN1}. The Attorney General of Ohio was notified of Ms. Ostrander's suit on May 3, 1999 but has not appealed the trial court's ruling.

Ms. Ostrander asserts one assignment of error:

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT.

Ms. Ostrander avers that the trial court erred in entering summary judgment in favor of Mr. Andrew

because there are material issues of fact remaining to be litigated with regard to whether the computer was purchased primarily for consumer or personal use, and hence, whether the transaction is covered by the Consumer Sales Practices Act. We disagree.

Pursuant to Civ.R. 56(C), summary judgment is proper if:

(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc. (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267. Appellate review of a lower court's entry of summary judgment is *de novo*, applying the same standard used by the trial court. McKay v. Cutlip (1992), 80 Ohio App.3d 487, 491, 609 N.E.2d 1272. The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record demonstrating an absence of genuine issues of material fact as to the essential elements of the nonmoving party's claims. Dresher v. Burt (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264. The movant must point to some evidence in the record of the type listed in Civ.R. 56(C) in support of his motion. *Id.* Once this burden is satisfied, the nonmoving party has the burden, as set forth in Civ.R. 56(E), to offer specific facts showing a genuine issue for trial. *Id.* The nonmoving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that shows a genuine dispute over the material facts exists. Henkle v. Henkle (1991), 75 Ohio App.3d 732, 735, 600 N.E.2d 791.

***2** The Consumer Sales Practices Act prohibits unfair or deceptive acts, R.C. 1345.02, and unconscionable acts or practices, R.C. 1345.03, in consumer transactions. Consumer transactions are defined as "a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things." R.C. 1345.01(A).

"A consumer transaction typically involves a natural person who obtains or is solicited to obtain an item of goods, a service, or an intangible primarily for personal, family, or household purposes. Also included are certain analogous transactions in which a natural person obtains or is solicited to obtain a business opportunity in which he has not been previously engaged."

Heritage Hills, Ltd. v. Deacon (1990), 49 Ohio St.3d 80, 82, 551 N.E.2d 125, quoting 7A Uniform Laws Annotated, Business and Financial Laws (Master Ed.1985), Uniform Consumer Sales Practices Act, 233, Official Comment to Section 2(1), at 235.

In the present case, the computer was purchased using a check drawn from the account of Old Forge. Moreover, that company is listed as the purchaser of the computer on the sales receipt from Mac Exchange. Also, in a letter dated April 23, 1999, it was an attorney representing Old Forge who complained of Mr. Andrew's conduct regarding the sale of a computer to Old Forge. Ms. Ostrander avers in her affidavit that the malfunctioning computer, which she originally brought to Mr. Andrew for service, was given to her as a bonus by Old Forge. Although, in her affidavit, Ms. Ostrander states that the malfunctioning computer was used by her for at least some personal purposes, she does not aver what the new computer was purchased for or whether it was purchased for her by Old Forge or whether it was purchased by Old Forge for itself as a replacement for the malfunctioning computer which was given to her. Hence, we conclude that no genuine issue of material fact remains in dispute as to whether the Consumer Sales Practices Act applies to the transaction in question because: (1) the sale of the malfunctioning computer was to Mr. Andrew where, to be a consumer transaction, the sale must be "to an individual for purposes that are primarily personal," (Emphasis added.) R.C. 1345.01(A); (2) the purchase of the new computer was by a corporation rather than a natural person, Deacon, 49 Ohio St.3d at 82, 551 N.E.2d 125; Toledo Metro Fed. Credit Union v. Ted Papenhagen Oldsmobile, Inc. (1978), 56 Ohio App.2d 218, 221, 381 N.E.2d 1337; and (3) although Ms. Ostrander may have used the malfunctioning computer for some personal purposes, the new computer was not purchased primarily for personal use, Barazzotto v. Intelligent Systems, Inc. (1987), 40 Ohio App.3d 117, 121, 532 N.E.2d 148. Hence, as we conclude that the transaction in this case was not covered by the Consumer Sales Practices Act, R.C. 1345.01 et seq., we conclude that the trial court did not err in entering summary judgment against Ms. Ostrander for her claim under that act. Accordingly, Ms. Ostrander's assignment of error is overruled.

Ms. Ostrander's assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

***3 Judgment affirmed.**

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

Costs taxed to Appellant.

Exceptions.

WHITMORE, J., concurs.

BAIRD, J., dissents, saying:

***3** In the absence of evidence that Old Forge was something other than Ostrander doing business as Old Forge, and in the presence of her affidavit that the item in question was used for personal purposes, it seems to me that there is a question of fact as to whether this transaction is covered by the Consumer Sales Practices Act. Under such circumstances, summary judgment would not be appropriate; accordingly, I would reverse the judgment of the trial court.

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