IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
October 16, 2001 Session

# MICHAEL BLAIN SAMPSON, ET AL. v. BURL WINNIE d/b/a WINNIE HIGH TECH HEATING AND AIR CONDITIONING

**Appeal from the Circuit Court for Roane County**
**No. 12051 Russell E. Simmons, Jr., Judge**

**FILED DECEMBER 11, 2001**

**No. E2000-02268-COA-R3-CV**

Michael Blain Sampson and Grace Parton ("Plaintiffs") brought suit against Burl Winnie d/b/a Winnie High Tech Heating and Air Conditioning ("Defendant"), alleging breach of contract and violation of the Tennessee Consumer Protection Act. Defendant installed a new gas heating and air conditioning unit in Plaintiffs' home, and shortly thereafter, Plaintiffs became dissatisfied with the new unit's performance and Defendant's installation of the unit. The Trial Court dismissed Plaintiffs' Tennessee Consumer Protection Act claim but awarded Plaintiffs damages for breach of contract in the amount of $2,600. Plaintiffs appeal. We affirm.

**Tenn. R. App. P. Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded.**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J., and HERSCHEL P. FRANKS, J., joined.

Dorothy B. Stulberg and William Allen, Oak Ridge, Tennessee, for the Appellants, Michael Blain Sampson and Grace Parton.

Gary L. McDonald, Kingston, Tennessee, for the Appellee, Burl Winnie d/b/a Winnie High Tech Heating and Air Conditioning.

## OPINION

### Background

Plaintiffs, Grace Parton and Michael Blain Sampson, are mother and son. Parton previously gave a deed to Sampson for her home, but thereafter, Parton continued to reside in the house. In 1996, Parton and Defendant entered into an oral agreement in which Defendant agreed to replace Plaintiffs' electric heating and air conditioning system with a gas unit and install a gas line for her fireplace.[1] This dispute involves only the installation of the gas heating and air conditioning unit. Although Plaintiffs' existing electrical system was working properly, Plaintiffs were interested in converting to gas heat since gas utilities had recently become available to their area.

Parton testified that Defendant told her that her old 2.5-ton electrical unit ("old unit") was too small for Plaintiffs' home. Plaintiffs further contend that Defendant told Parton their house required a 3-ton gas pack central system which was a combination gas furnace and electric air conditioner ("new unit"). Parton testified that Defendant planned to install the new unit at the front exterior of the house, near the location of old unit which was inside a closet in Plaintiffs' den. Parton also testified Defendant assured her he would install a good unit which absolutely would work. The parties' agreement was silent regarding ductwork. It is undisputed that the parties agreed upon a price of $3,200 for the entire job.

Shortly after the parties entered into their agreement, Defendant appeared at Plaintiffs' home and requested payment of the entire contract price of $3,200. Plaintiffs contend that Defendant told Parton he needed the money to purchase a truck. Parton paid Defendant the full contract price despite the fact that Defendant had not completed the promised work.

Shortly thereafter, Defendant's employees installed the new unit. Defendant did not, however, install the new unit at the front exterior of the house as promised, but instead, installed the unit at the rear of the house. Parton contends that during the installation, she witnessed Defendant's employees knocking out a wall in her den, and that they told her Defendant changed his mind about where the new unit should be located. Plaintiff denied she agreed to this change but testified she relied upon Defendant's judgment.

---

[1] The record on appeal contains a document entitled "Proposal" which contains a job description of "Change out." The Proposal further states as follows:

> Hi Tech Heat & Air will remove existing (non-working) heat pump and replace with Janitrol 3 ton package gas heat and air unit.
>
> Hi Tech will provide additional gas line to fireplace while working up unit.

The Proposal states that the total price for material and labor is $3,200. The Proposal is only signed by Defendant. The document also contains a box captioned "Acceptance of Proposal" and instead of Plaintiffs' signatures, bears the notation "Job Approved by Telephone[.]"

After Defendant installed the new unit, Plaintiffs became dissatisfied. Plaintiffs' complaints regarding the new unit involve: (1) the size of the new unit; (2) location and installation of the new unit; (3) installation of the new return air duct; and (4) the quality of Defendant's workmanship. In addition, Plaintiffs claim the new unit does not properly heat or cool their house and that as a result, Plaintiffs had to purchase fans and space heaters to assist their cooling and heating efforts. Defendant testified that after the project was finished, the new unit worked properly and Parton was happy with the installation.[2]

Parton testified she called Defendant with her complaints as frequently as two to three times per week. According to Plaintiffs, Defendant responded to her calls only once by sending two employees who told Parton to turn up the thermostat if she was cold. Defendant, however, claims that Parton telephoned him only once and that a service call was made in response. According to Defendant, the service call showed no problems with the new unit. Moreover, Defendant testified that some time after receiving Plaintiffs' complaints, he offered Plaintiffs one-half of their contract price, $1,600.

Plaintiff presented the testimony of four expert witnesses at trial: William Sylvia, David Roberts, Lee Phillips and Shannon Hill.[3] Three of these witnesses, Sylvia, Roberts and Phillips, provided an opinion about the size of the new unit. All three testified that the new unit is too large for Plaintiffs' home and that the size of the new unit is not compatible with the existing ductwork.

William Sylvia, Parton's brother, testified the new unit requires an upgrade of the ductwork because the new unit cannot get enough cubic feet of air through the existing ductwork. Sylvia further opined that the new return air duct installed by Defendant is too small for the new unit.

David Roberts testified there was no way the new unit, as installed by Defendant, could adequately heat and cool the house. Roberts further opined that the too-large new unit results in shorter run cycles which, in turn, shortens the life of the unit, makes the home less comfortable, and results in higher humidity and lower operating efficiency. Roberts testified that if he were installing the 3-ton unit in Plaintiffs' home, he would have to replace all of the existing ductwork which Roberts estimated would cost between $1,800 and $2,200. Roberts testified that even after replacing the existing ductwork, the new 3-ton unit would still be too large for Plaintiffs' home and cause problems with the efficiency and life of the unit.

Another of Plaintiffs' expert witnesses, Lee Phillips, is a general home inspector but not licensed in heating and air. Phillips testified the old and new units are totally different with respect to the way they are ducted. Phillips also opined that it was rare to replace an existing heating

---

[2] Sampson was not present when Parton and Defendant entered into the oral agreement or during the installation of the new unit.

[3] Roberts and Silva testified at trial, while Phillips and Hill testified by deposition only.

and air unit with a larger one. Phillips testified that the new unit was poorly installed and was inadequate to efficiently heat and cool Plaintiffs' home.

In contrast, Defendant testified that Plaintiffs' home is uncomfortable with the new unit because of the existing ductwork which he characterized as old and poorly installed. Defendant further testified that a replacement of the Plaintiffs' existing duct system would require tearing out sheetrock which was not within the parameters of the parties' contract. Defendant maintained that he was hired only to perform a change-out of the heating and air system, not a replacement of the duct system. Defendant, however, testified he had to install a new return air duct to avoid having to tear out the existing return. Defendant testified that "the duct work we had to do was really difficult to try to do[.] [W]e had a heck of a lot of man hours and a lot of work to try to get it to where it would work." The record shows that Defendant's testimony regarding the cost associated with the replacement of the ductwork was consistent with Roberts' estimate as Defendant first opined the cost would be $2,100 and later testified it would be $1,800.

Plaintiffs claim their expert witness testimony established that Defendant installed the new unit in the wrong location in the house. The old unit was located in a central location of Plaintiffs' home whereas Defendant installed the new unit in the rear of the house. Phillips testified the location of the new unit at the opposite end of the house caused the system to work harder to force air through the ductwork. Defendant, on the other hand, testified the new unit could not be placed in the location of the old unit because the new unit could not be vented out of the home. In addition, Plaintiffs complain about Defendant's locating the new return air duct on the ceiling of Plaintiffs' den since, among other things, the new return air duct was not centrally located in their home as it should have been, resulting in a temperature differential between the upstairs and downstairs levels.

Moreover, Plaintiffs raise issues about the quality of Defendant's workmanship regarding a number of matters, including the new return air duct located in their den. Plaintiffs contend the silver return air duct is unsightly and hangs from the den's ceiling, interfering with their use and enjoyment of their den. Furthermore, Plaintiffs contend their den's wood paneling was shoddily cut by Defendant during the installation of the new return air duct. Defendant, however, contends that Parton was informed of the installation and location of the new return air duct and agreed to it.

One of Plaintiffs' expert witnesses, Shannon Hill, a licensed contractor, prepared an estimate for Plaintiffs regarding how much it would cost to place Plaintiffs' home in the condition it was in prior to Defendants' installation of the new unit. Hill testified he based his estimate upon what Parton requested, which included removing the new return air duct in the den, removing the new unit, and repairing the walls' damage. Hill's estimate for materials and labor totaled $2,100.

Plaintiffs filed suit in March 1998 against Defendant in Roane County General Sessions Court for breach of contract, alleging unspecified damages under $15,000. Plaintiffs' Civil Warrant states that Plaintiffs contracted with Defendant to install a heat and air conditioning unit in

their home but that the unit Defendant installed was not properly installed and that the unit did not properly function. Thereafter, in October 1998, Plaintiffs filed an Amended Warrant in General Sessions Court to include violations of the Tennessee Consumer Protection Act ("TCPA") and the Uniform Commercial Code. The General Sessions Court held a trial and awarded Plaintiffs $2,150. Plaintiffs appealed *de novo* to the Trial Court.

On *de novo* appeal, the trial was held in April 2000. The Trial Court awarded Plaintiffs breach of contract damages in the amount of $2,600 plus court costs. The Trial Court dismissed Plaintiffs' TCPA claim. The Trial Court made no specific mention of Plaintiffs' Uniform Commercial Code claim and Plaintiffs raise no issue on appeal concerning any claim under the Uniform Commercial Code

While the Order contained no findings of fact, the record on appeal contains the Trial Court's notes ("Notes") which contains findings of fact. According to Plaintiffs' brief on appeal, the Trial Court's Notes were originally handwritten and later typed by the parties. Plaintiff, by motion, asked the Trial Court to order the typed copy of the Trial Court's Notes forming the basis for the Court's findings be made a part of the record. The Trial Court granted Plaintiffs' motion and ordered that "the notes forming the basis of the Court's findings . . . be added to the record." The record on Appeal contains the typed version of the Notes, and apparently, the parties agree on appeal that these Notes reflect, as ordered by the Trial Court, the findings of fact by the Trial Court. The Trial Court's Notes provide the following:

> The Court finds from the evidence that the parties entered [sic] an oral contract in which Plaintiff was to pay $3,200.00 to Defendant, and Defendant was to supply material and labor and install a gas unit for heating and air conditioning that would be adequate for the vendor [sic].
>
> Presence of Mrs. Parton – she acquiesced in change from front yard to back and modifications in den. Mr. Winnie had superior knowledge as to fitting the unit to the system.
>
> The Court finds that there was breech [sic] of contract as to the relationship in that the unit and the modifications to the ductwork did not allow adequate airflow, and the Court further finds the Plaintiffs did not sustain their burden of proof as to a misrepresentation or fraudulent conduct on the part of the Defendant.
>
> Ms. Parton, as agent for Mr. Sampson as I said before, bears some responsibility for entering a verbal contract and allowing the Defendant to continue work if she felt it was contrary to the agreement.

> The Court finds that the Plaintiffs should receive judgment for $2,100.00 which is the value of installing new ductwork, and $500.00 for damage to the unit be [sic] its use with the inadequate ductwork, for a total judgment of $2,600.00 plus court costs.

Plaintiffs appeal.

## Discussion

Plaintiffs present two issues for review in this appeal. We quote these issues from Plaintiffs' brief as follows:

> I. The Trial Court erred in dismissing Appellants' claim that Appellee violated the Tennessee Consumer Protection Act.
>
> II. The Trial Court's award of damages was insufficient to compensate Appellants for Appellee's breach of contract.

Defendant raises no specific issues on appeal but argues that the Trial Court correctly dismissed Plaintiffs' TCPA claim. Defendant contends that Plaintiffs failed to carry their burden of proof regarding their TCPA claim.

Our review is *de novo* upon the record, accompanied by a presumption of correctness of the findings of fact of the Trial Court, unless the preponderance of the evidence is otherwise. Tenn. Rule App. P. 13(d); *Alexander v. Inman*, 974 S.W.2d 689, 692 (Tenn. 1998). A Trial Court's conclusions of law are subject to a *de novo* review with no presumption of correctness. *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997). With respect to the Trial Court's decision not to award Plaintiffs the remedy of rescission as part of their damages, we will review this decision using an abuse of discretion standard. *Wilkey v. Rhea County*, No. E1999-00307-COA-R3-CV, 2000 WL 782011, at * 3 (Tenn. Ct. App. June 20, 2000), *no appl. perm. app. filed*; *Vakil v. Idnani*, 748 S.W.2d 196, 199-200 (Tenn. Ct. App. 1987). We should not reverse for "'abuse of discretion' a discretionary judgment of a trial court unless it affirmatively appears that the Trial Court's decision was against logic or reasoning, and caused an injustice or injury to the party complaining.'" *Marcus v. Marcus*, 993 S.W.2d 596, 601 (Tenn. 1999) (quoting *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996)).

We first address Plaintiffs' argument on appeal regarding the Trial Court's dismissal of their TCPA claim. The purpose of the TCPA is provided by Tenn. Code Ann. § 47-18-102, in pertinent part, as follows:

> The provisions of this part shall be liberally construed to promote the following policies:

> (2) To protect consumers . . . from those who engage in unfair or deceptive acts or practices in the conduct of any trade or commerce in part or wholly within this state;
>
> (3) To encourage and promote the development of fair consumer practices;
>
> (4) To declare and to provide for civil legal means for maintaining ethical standards of dealing between persons engaged in business and the consuming public to the end that good faith dealings between buyers and sellers . . . be had in this state . . . .

The TCPA provides for a private right of action in Tenn. Code Ann. § 47-18-109(a)(1), as follows:

> Any person who suffers an ascertainable loss of money or property, real, personal, or mixed, . . . as a result of the use or employment by another person of an *unfair or deceptive act or practice declared to be unlawful by this part*, may bring an action individually to recover actual damages.

(emphasis added). Tenn. Code Ann. § 47-18-104(b) provides an extensive list of "unfair or deceptive acts or practices . . . declared to be unlawful and in violation of this part. . . ." A person may recover actual damages under the TCPA for negligent conduct if the necessary elements of a TCPA claim are satisfied. *Smith v. Scott Lewis Chevrolet, Inc.*, 843 S.W.2d 9, 12-13 (Tenn. Ct. App. 1992). Moreover, a trial court may award the buyer reasonable attorney's fees and costs for a violation of the TCPA. Tenn. Code Ann. § 47-18-109(e)(1).

The TCPA also provides for recovery of treble the amount of actual damages and "such other relief as [the court] considers necessary and proper" in the event the court finds the seller's "unfair or deceptive act or practice was a willful or knowing violation of this part. . . ." Tenn. Code Ann. § 47-18-109(a)(3). The TCPA provides a definition of "knowing" as follows:

> "Knowingly" or "knowing" means actual awareness of the falsity or deception, but actual awareness may be inferred where objective manifestations indicate that a reasonable person would have known or would have had reason to know of the falsity or deception . . .

Tenn. Code Ann. § 47-18-103(6).

On appeal, Plaintiffs contend the Trial Court erred in dismissing their TCPA claim and in failing to award Plaintiffs treble damages and attorney's fees. We find no error in the Trial Court's dismissal of this claim. The evidence in the record on appeal does not preponderate against

the Trial Court's findings and resulting determination that Plaintiffs did not establish that Defendant's conduct amounted to an unfair or deceptive act or practice in violation of the TCPA. *See* Tenn. Code Ann. §§ 47-18-104(b); 47-18-109(a)(1). The proof in the record establishes, as found by the Trial Court, that Defendant failed to install a new gas heating and air conditioning unit that was compatible with Plaintiffs' existing ductwork, and that this was a breach of contract by the Defendant. While a plaintiff may recover, under certain circumstances, for negligence under the TCPA, a review of Tenn. Code Ann. §§ 47-18-104(b)(1)-(33) shows that Defendant's breach of contract as proven by Plaintiffs does not constitute a violation of the TCPA. *See Smith v. Scott Lewis Chevrolet, Inc.*, 843 S.W.2d at 12-13. Accordingly, we affirm the Trial Court's dismissal of Plaintiffs' TCPA claim. Consequently, Plaintiffs' claim for relief under the TCPA, including recission, treble damages, and attorney's fees, is without merit.

Plaintiffs' second issue on appeal concerns the Trial Court's award of damages in the amount of $2,600. Plaintiffs assert that this award of $2,600 is insufficient to compensate them for Defendant's breach of contract. The Trial Court's Notes provide that the $2,600 award includes $2,100 for the cost of installing new ductwork and $500 "for damage to the be [sic] its use with the inadequate ductwork. . . ." Plaintiffs contend that $2,600 is not sufficient and that the Trial Court should have awarded a total of $5,600 which includes: (1) the contract price of $3,200; (2) the cost of repairs to their home associated with the removal of the new unit and return air duct and repairs to the walls and paneling in the amount of $2,100; (3) and Plaintiffs' out-of-pocket expenses for new fans and space heaters in the amount of $300.

Although neither the Order nor the Trial Court's Notes directly state as such, the difference between the amount Plaintiffs request for their damages and the amount awarded by the Trial Court results from the Trial Court's determination that the contract should not be rescinded and the new unit removed, but rather that the existing ductwork should be upgraded so as to be compatible with the new unit. This determination hinged upon the testimony of witnesses, including Plaintiffs' expert witnesses. The proof in the record shows that one of Plaintiffs' expert witnesses, David Roberts, testified the larger, new unit required the existing ductwork be upgraded. Further, Defendant testified the existing ductwork was old and poorly installed. In addition, Roberts testified that the cost associated with upgrading the ductwork was between $1,800 and $2,200, while Defendant testified the cost would be either $1,800 or $2,100. We acknowledge that three of Plaintiffs' expert witnesses, including Roberts, testified that the new 3-ton unit was too large for Plaintiffs' home and that Roberts testified that even if the ductwork were upgraded, the new unit would still be too large for Plaintiffs' home which would affect the unit's efficiency and life. The Trial Court took this into consideration when it awarded Plaintiff $500 for damages to the unit itself resulting from use with inadequate ductwork.

The Trial Court "was in the best position to evaluate [the witnesses'] credibility [since] "[u]nlike this Court, the [T]rial [C]ourt observed the manner and demeanor of the witnesses . . . ." *Union Planters Nat'l Bank v. Island Mgmt. Auth., Inc.*, 43 S.W.3d 498, 502 (Tenn. Ct. App. 2000). The Trial Court's determinations regarding credibility are accorded deference by this Court. *Id.*; *Davis v. Liberty Mutual Ins. Co.*, 38 S.W.3d 560, 563 (Tenn. 2001). "[A]ppellate courts will

not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary." *Wells v. Tennessee Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999). Accordingly, in light of the deference we must give the Trial Court's determinations of credibility, we find no error with the Trial Court's conclusion that the proper measure of damages for Defendant's breach of contract was the cost of upgrading Plaintiffs' existing ductwork plus an additional $500 for damages associated with the use of the new unit with the existing inadequate ductwork rather than rescission with damages being the costs of removing the new unit and making repairs to the walls and paneling. We believe the Trial Court applied the proper measure of damages relevant to Plaintiffs' breach of contract claim, and that the evidence in the record before us does not preponderate against the Trial Court's finding as to the amount necessary to place the Plaintiffs in the condition they would have been had Defendant not breached the contract.

## Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for such further proceedings as may be required, if any, consistent with this Opinion, and for collection of the costs below. The costs on appeal are assessed against the Appellants, Michael Blain Sampson and Grace Parton, and their surety.

_____

D. MICHAEL SWINEY, JUDGE