[Cite as *Cunningham v. Protect Autoworks*, 2016-Ohio-4745.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

PAUL CUNNINGHAM,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2015-P-0066**
- vs -	:	
PROTECT AUTOWORKS,	:	
Defendant-Appellee.	:	

Civil Appeal from the Portage County Municipal Court, Kent Division, Case No. 2015 CVI 00353K.

Judgment: Affirmed.

Paul Cunningham, pro se, 5066 Shermanwood Drive, Brimfield, OH 44240 (Plaintiff-Appellant).

Protect Autoworks, pro se, 7279 State Route 43, Kent, OH 44240 (Defendant-Appellee).

DIANE V. GRENDELL, J.

{¶1} Plaintiff-appellant, Paul Cunningham, appeals from the Judgment Entry of the Portage County Municipal Court, Kent Division, granting judgment in favor of the defendant-appellee, Protech Autoworks.[1] The issues to be determined in this case are whether a trial court's decision that a car repair was made, based on competing testimony on that issue, was against the weight of the evidence; whether violations of the Consumer Sales Practices Act are proven when testimony from a company's

1. The case was captioned with the incorrect name in the lower court, Protect Autoworks.

employee shows that the service paid for was provided; and whether issues can be raised on appeal that were not presented to the trial court. For the foregoing reasons, the judgment of the lower court is affirmed.

{¶2} On March 26, 2015, Paul Cunningham filed a Small Claim Complaint, in which he asserted that he and his wife, Sharyll Cunningham, took a 1998 Cadillac Eldorado to Protech for repairs. The Complaint alleged that "Protec[h] Autoworks was to replace the head gasket but they said the car only need[ed] an intake manifold so they replace[d] that * * *." After the repair, the car continued to have overheating and smoking problems. The car was returned to Protech to replace the head gasket, but the car was never given back to the Cunninghams, nor was their money refunded. Paul requested damages in the amount of $3,000.

{¶3} A trial was held on June 23, 2015, at which claims filed by both Sharyll and Paul, arising from the same issue, were argued together. The following testimony was presented:

{¶4} At the beginning of the trial, the court questioned whether the Cunninghams were suing for the return of the car, and Sharyll responded that they knew they could not sue for the car, since it was not in their name. She confirmed that they "just want a return of [their] money," which was $1,455.95 paid for the repair.

{¶5} Sharyll testified that she and her husband had taken the car to a mechanic on March 23, 2012, for a brake repair and to have "the car checked out." They were told that the car needed "head gaskets and the minor break repair." They subsequently went to Protech in February 2013, based on the recommendation of Firestone. According to Sharyll, Protech said the car did not need a head gasket but a manifold replacement. Protech was paid $1,455.95. Immediately after retrieving the vehicle, the

Cunninghams had additional problems and returned to Protech. According to Sharyll, Protech was "supposed to re-fix it and put the head gasket on like we had asked them to in the beginning." After that point, the car was not returned to them. When questioned by the judge whether there was evidence that Protech did not complete the repairs for which the Cunninghams paid, Sharyll testified that they do not have the car, but she believed the car did not need a manifold replacement and that Protech did not show them the removed manifold.

{¶6} Paul testified that he requested that Protech replace the head gasket because he knew it was causing an overheating problem. After the repair to the manifold, it was necessary to take it back for a repair of the head gasket. He asserted that "[t]he money that we paid for the repair of the vehicle wasn't necessary because the problem that we took it there [for] was never taken care of and the end result [is] we do not have a vehicle."

{¶7} Eric Palivec, the owner of Protech, testified that he spoke with Paul Cunningham when he brought the car in, and Paul suspected a blown head gasket. Upon inspecting the vehicle, Palivec noticed that the manifold had a golf ball-sized hole. Initial tests for the head gasket issue had come back negative. Palivec gave Cunningham an estimate over the phone for the manifold repair, Cunningham replied to "go ahead and make the repairs." Palivec completed a repair of the manifold and the brake lines, test drove the car, and it was running. Within one half an hour of picking up the car, the Cunninghams returned with it overheating and Protech agreed to look into fixing the head gasket. Through additional inspection and testing, it was determined that the vehicle had a cracked cylinder head. The car remained at Protech until Protech filed an Unclaimed Motor Vehicle Affidavit and obtained title.

{¶8} Various exhibits were presented. Copies of an Invoice from Protech showed that the manifold was replaced and brakes were repaired. A copy of the payment receipt for $1,455.95 was present on the copy of the Invoice.

{¶9} A Judgment Entry was filed on June 24, 2015. The trial court made several factual findings, including that the Cunninghams authorized the work for the manifold and brakes, payment for $1,455.95 was made, the vehicle had problems shortly after the Cunninghams drove it away, and head gasket and engine problems were subsequently determined to be an issue.

{¶10} The lower court held that, in addition to the head gaskets, it was proven that "multiple other problems with the car, as evidenced in Exhibit A, also existed and were fixed appropriately." Further, no evidence was before the court "to indicate that the services rendered by the defendant were not done and the costs to do so were not unreasonable. The fact that the car needed more repairs does not negate the work completed by the defendant and costs thereof." The court rendered judgment in favor of Protech.

{¶11} Paul timely appeals and raises the following assignments of error:

{¶12} "[1.] The trial court erred in ruling against the appellant for return of his money from the appellee is against the manifest weight of the evidence case; The trial court error by granting a judgment in favor of the Appellee/Defendant Protect Autowork and denying return of Appellant/Plaintiff money plus damages[.] (sic)

{¶13} "[2.] The trial court erred in ruling against the appellant for return of his money from the appellee is against the manifest weight of the evidence case; Defendant has violated the Consumer Sales Practices Act and wrongfully exercised

dominion and control over the vehicle in a manner inconsistent with his rights and the owner's Mary Primus's rights therefore converted the vehicle. (sic)

{¶14} "[3.] The trial court erred in ruling against the appellant for return of his money from the appellee is against the manifest weight of the case; Plaintiff claims that the Defendant has caused him emotional distress. (sic)

{¶15} "[4.] The trial court erred in ruling against the appellant for return of his money from the appellee is against manifest weight of the evidence case; where a supplier has engaged in an act or practice declared to be deceptive by a rule adopted pursuant to R.C. 1345.05(B)(2). (sic)

{¶16} "[5.] The trial court erred in ruling against the appellant for return of his money from the appellee is against the manifest weight of the evidence case; June 23, 2013 the Portage County Court, Kent Division held a small claim hearing the Appellee/Defendant submitted evidence 'Exhibit A.' Appellant/Plaintiff tried to have the court throw out 'Exhibit A.'" (sic)

{¶17} In each of his assignments of error, Paul contends that the trial court's judgment is against the weight of the evidence. Weight of the evidence concerns "'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other.'" (Citations omitted.) (Emphasis deleted.) *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 12. In a civil case, "'[t]he [reviewing] court * * * weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [finder of fact] clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered.'" (Citation omitted.) *Meeker R&D, Inc. v. Evenflo Co.*, 11th Dist. Portage Nos.

2014-P-0060 and 2015-P-0017, 2016-Ohio-2688, ¶ 40, citing *Pelmar USA, LLC v. Mach. Exch. Corp.*, 2012-Ohio-3787, 976 N.E.2d 282, ¶ 10 (9th Dist.).

{¶18} We will consider the first and fourth assignments of error jointly, since they both include claims for violations of the Consumer Sales Practices Act.

{¶19} In his first assignment of error, Paul argues that the court's judgment in favor of Protech and failure to return the Cunninghams' payment for the repair is against the manifest weight of the evidence.[2]

{¶20} At trial, testimony was provided by Palivec that he discussed the manifold repair with Paul, it was authorized by the Cunninghams, it was completed, and payment was made. While the Cunninghams believed additional repairs should have been done, this does not alter the fact that the invoice shows they paid for the manifold repair which Palivec stated was authorized. Palivec noted that, regardless of other issues the car also had, the manifold had a golf ball-sized hole and needed to be replaced. The court was entitled to believe this testimony and find that the repair the Cunninghams paid for, the manifold replacement, was authorized and completed. *Karnofel v. Watson*, 11th Dist. Trumbull No 99-T-0052, 2000 Ohio App. LEXIS 2770, 3 (June 23, 2000) (determinations as to the credibility of witnesses and the weighing of evidence in a small claims matter are tasks "for the trier of fact, not the appellate court").

{¶21} In his fourth assignment of error, Cunningham argues that the court's ruling was against the weight of the evidence since Protech engaged in a deceptive practice "pursuant to R.C. 1345.05(B)(2)." Similarly, in his first assignment, Paul argues

2. Page 26, which presumably discusses a portion of the first assignment of error, was not included in Paul's brief when filed with the clerk of courts and, thus, cannot be addressed.

a violation of the Consumer Sales Practices Act, and cites Ohio Administrative Code 109:4-3-13, relating to motor vehicle repairs and deceptive acts.

{¶22} "The Consumer Sales Practices Act prohibits unfair or deceptive acts and unconscionable acts or practices by suppliers in consumer transactions." *Einhorn v. Ford Motor Co.*, 48 Ohio St.3d 27, 29, 548 N.E.2d 933 (1990); R.C. 1345.02(A) ("No supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a supplier violates this section whether it occurs before, during, or after the transaction."); R.C. 1345.03.

{¶23} As to the first assignment of error, Paul argues that the Ohio repair laws were violated, including several pages of text quoting from Ohio Adm.Code 109:4-3-13. That section outlines many obligations for a supplier repairing a vehicle, including providing estimates and completing paid-for services. Paul does not, however, explain which section of the law he alleges was violated. We find nothing in the testimony below to show a violation of this law. Testimony was presented that the Cunninghams were told the repairs that would be conducted, told the approximate cost, agreed to the repairs, and that the repairs were completed. In the absence of a specific complaint clearly supported by the record, this argument lacks merit.

{¶24} As to the fourth assignment of error, Paul again argues that Protech was deceptive. Paul fails to explain specifically what act by Protech was deceptive, making it difficult to analyze his argument. *Lawson v. Mach*, 6th Dist. Lucas No. L-90-230, 1991 Ohio App. LEXIS 1752 (Apr. 19, 1991), cited by Paul, discussed a claim for a failure to provide a service when a customer has paid for such service. Here, the court found that Protech did provide the service paid for by the Cunninghams, repairing the intake manifold as described on the invoice. The court chose to believe Palivec's testimony

that the repair was completed. Again, we find no basis for second-guessing that determination, as the lower court was in the best position to assess the credibility of the witnesses and the Cunninghams failed to provide evidence that the work was not completed. In the absence of any other argument regarding the deceptive act committed by Protech, we can find no violation of R.C. Chapter 1345.

{¶25} The first and fourth assignments of error are without merit.

{¶26} In his second assignment of error, Paul argues that Protech violated the Consumer Sales Practices Act and converted the vehicle, holding it as collateral.

{¶27} While Paul argues a violation of the Consumer Sales Practices Act, his argument essentially is that Protech converted the vehicle wrongfully and, thus, he should be awarded the value of the vehicle.

{¶28} Paul cannot prevail on this argument because no conversion claim was before the trial court. While Paul stated in his Complaint that Protech "never gave back the car," at the hearing, Sharyll noted that they had been told they could not sue because the car was not in their name and agreed with the judge's statement that "all you're suing for is the amount of money that you paid for the repair," which Paul later confirmed. Since the Cunninghams agreed that they would not be pursuing any claim related to the vehicle itself, the court could not have erred by failing to enter judgment in their favor on this issue. If the Cunninghams believed judgment should have been granted on this claim, they should not have informed the court that no such judgment was sought. *Compare State v. Bey*, 85 Ohio St.3d 487, 493, 709 N.E.2d 484 (1999) ("[u]nder the invited-error doctrine, '[a] party will not be permitted to take advantage of an error which he himself invited or induced'") (citation omitted.)

{¶29} The second assignment of error is without merit.

{¶30} In his third assignment of error, Paul argues that he suffered emotional distress as a result of his interaction with Protech.

{¶31} Neither Paul's Complaint, nor any testimony at the trial, raised a claim for emotional distress. An appellate court cannot consider issues or claims that were not raised in the lower court. *Ray v. Petersen*, 11th Dist. Geauga No. 2001-G-2387, 2002-Ohio-6575, ¶ 9 ("[i]t is axiomatic that a party cannot raise issues for the first time on appeal that were not raised below"); *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 80, 679 N.E.2d 706 (1997) ("[o]rdinarily reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed") (citation omitted). As noted above, Sharyll agreed that they were only suing for the amount of the repair and did not request damages for emotional distress, nor did Paul. He noted that their claim was that "the money that we paid for the repair of the vehicle wasn't necessary." Cunningham's brief also presents no argument supporting a claim for emotional distress.

{¶32} The third assignment of error is without merit.

{¶33} In his fifth assignment of error, Paul argues that the trial court erred in admitting "Exhibit A," since he contends the defendant "change[d] some of the original wording to fit their case." He argues that the court should have considered the original, which he had, and not Exhibit A.

{¶34} The Ohio Rules of Evidence do not apply in the small claims division. *Cunningham v. Miller*, 11th Dist. Trumbull No. 2009-T-0092, 2010-Ohio-2526, ¶ 27. Considering that principle, and when reviewing the exhibits, we find no error in the admission and consideration of the exhibits by the lower court.

{¶35} Paul does not point to specific wording he contends is altered in "Exhibit A," nor does he provide any evidence that Protech altered any exhibit. The court accepted as exhibits multiple copies of the manifold repair invoice, which show the same information, including work performed and the invoice total. While they were printed on different dates, they contain the same "date written." Further, since the key issue was whether the work was performed and authorized, differences in the printout date are of little import. While the Cunninghams took issue with what they alleged to be differences in the balance due, there was no dispute that the Cunninghams paid for the repair. The court was able to examine these exhibits and listen to the testimony related to them, and noted that it would determine the value to give the exhibits. Based on a review of the exhibits presented, and the lack of argument supporting a conclusion that the exhibits were inaccurate, we find no error.

{¶36} The fifth assignment of error is without merit.

{¶37} For the foregoing reasons, the judgment of the Portage County Municipal Court, Kent Division, granting judgment in favor of Protech, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, P.J.,

TIMOTHY P. CANNON, J.,

concur.