ATTORNEY FOR APPELLANTS:

**CRAIG W. GRAHAM**
Jeffersonville, Indiana

# IN THE
# COURT OF APPEALS OF INDIANA

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| ROSE MARY WHITSON and JOSEPH E. WHITSON, | ) | |
| Appellants-Defendants, | ) | |
| vs. | ) | No. 10A04-0702-CV-114 |
| DIANE VEST, | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE CLARK SUPERIOR COURT
The Honorable Steven M. Fleece, Judge
The Honorable Kenneth R. Abbott, Magistrate
Cause No. 10D03-0611-SC-1785

**September 25, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## Case Summary

Rose Mary Whitson and Joseph E. Whitson appeal the judgment of the small claims court in favor of Diane Vest. We reverse.

## Issues

The Whitsons raise three issues, but only the two following restated issues require our review:

I. Whether the Whitsons's statute of frauds claim is waived; and

II. Whether the small claims court judgment in favor of Vest is clearly erroneous.[1]

## Facts and Procedural History

In part because this is a case arising in small claims court, the record before us is minimal.[2] According to the Whitsons, they had an agreement with Fifth Third Bank to purchase a vehicle, pursuant to which they were required to make monthly payments. In August 2003, Vest entered into an agreement with Joseph to buy that vehicle. Vest and Joseph did not set a specific purchase price, but Vest agreed to make the monthly payments directly to Fifth Third Bank and to maintain insurance for the vehicle. Joseph agreed to give Vest possession of the vehicle. She made monthly payments to Fifth Third Bank of $195 between September 2003 and January 2004.

[1] Because we reverse the small claim court's judgment, we need not address the Whitsons's argument that Rose Mary is not liable to Vest.

[2] In fact, the record contains only the judgment, chronological case summary, and transcript.

In January 2004, Joseph refinanced with Fifth Third Bank, in his name only, and Vest's payments were reduced to $140 a month. In June 2006, Fifth Third Bank called Joseph seeking $245 for missed car payments. Joseph informed the bank that he did not have the vehicle, that he would not make the payment, and that Vest had the vehicle. On June 30, 2006, Fifth Third Bank called Vest and informed her that the vehicle would be repossessed. On July 3, 2006, Fifth Third Bank repossessed the vehicle. The Whitsons received notice regarding the bank's sale of the vehicle. Although Joseph did attempt to contact Vest through her daughter, he did not mail the notice to Vest's post office box. Fifth Third Bank sold the vehicle for $4283. However, the amount received in the sale was less than the amount that Joseph owed Fifth Third Bank, leaving a deficiency balance of $892.

On November 27, 2006, Vest brought an action in small claims court against the Whitsons, seeking reimbursement from them for the payments she made to Fifth Third Bank. Vest had made payments to Fifth Third Bank totaling $4122. After a hearing on June 26, 2007, the small claims court granted judgment in favor of Vest in the amount of $3230 plus court costs and post-judgment interest at 8% per annum.[3] The Whitsons appeal.

## Discussion and Decision

### *I. Statute of Frauds*

Initially, we observe that Vest has not submitted an appellee's brief. When an appellee declines to file a brief, we will not "undertake the burden of developing arguments for the appellee." *In re Paternity of B.D.D.*, 779 N.E.2d 9, 13 (Ind. Ct. App. 2002).

Consequently, "[w]e apply a less stringent standard of review with respect to showings of reversible error, and we may reverse the trial court's decision if the appellant can establish prima facie error." *Id*. In this context, prima facie error is defined as "at first sight, on first appearance, or on the face of it." *Santana v. Santana*, 708 N.E.2d 886, 887 (Ind. Ct. App. 1999). Where an appellant is unable to meet this burden, we will affirm. *Id*.

While the record is barren of any basis for Vest's claim against the Whitsons, to the extent that Vest's claims are based upon the parties' contract, the Whitsons argue that the contract between them and Vest is unenforceable because it fails to meet the requirements of the statute of frauds. The statute of frauds provides:

> [A] contract for the sale of goods for the price of five hundred dollars ($500) or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.

Ind. Code § 26-1-2-201(1). However, the Whitsons failed to argue before the small claims court that the statute of frauds barred enforcement of the contract. Issues not raised before the small claims court are not preserved for appeal. *Gaddis v. Stardust Hills Owners Ass'n, Inc*., 804 N.E.2d 231, 236 (Ind. Ct. App. 2004). Accordingly, the Whitsons's statute of frauds claim is waived for review.

Waiver notwithstanding, the Whitsons's claim regarding the applicability of the statute of frauds must fail inasmuch as one of the exceptions to the statute of frauds applies in this case. Indiana Code Section 26-1-2-201(3)(b) provides that "[A] contract which does not

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[3] While the record is silent as to how the small claims court decided to award Vest the sum of $3230, it appears that this figure is reached by subtracting the amount still due Fifth Third Bank, $892, from the

satisfy the requirements of subsection (1) but which is valid in other respects is enforceable … if the party against whom enforcement is sought admits in his pleadings, testimony, or otherwise in court that a contract for sale was made[.]" The Whitsons admitted that they had a contract with Vest. Tr. at 9. This testimony is an admission within the meaning of the statutory exception to the statute of frauds. *See Wehry v. Daniels*, 784 N.E.2d 532, 536 (Ind. Ct. App. 2003) (holding that defendant's affirmative response when asked whether he told plaintiff to place order was admission within meaning of statute). The contract is therefore enforceable by Vest. *See id*.

### *II. Judgment*

The Whitsons contend that the judgment of the small claims court is clearly erroneous. We observe that "judgments in small claims actions are 'subject to review as prescribed by relevant Indiana rules and statutes.' " *Wehry*, 784 N.E.2d at 534 (quoting Ind. Small Claims Rule 11(A)). When reviewing claims tried by the bench without a jury, we will not set aside the judgment "unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *Id*. (quoting Ind. Trial Rule 52(A)). In determining whether a judgment is clearly erroneous, we neither reweigh the evidence nor assess the credibility of witnesses. *Id*. Rather, we look to the evidence that supports the judgment and the reasonable inferences to be drawn therefrom. *Id*. A deferential standard of review is particularly important in small claims actions, where trials are "'informal, with the sole objective of dispensing speedy justice between the parties according to the rules of substantive law.'" *City of Dunkirk Water & Sewage Dep't v. Hall*, 657 N.E.2d 115, 116 (Ind.

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amount Vest paid to Fifth Third Bank, $4122.

1995) (quoting Small Claims Rule 8(A)). But this deferential standard does not apply to the substantive rules of law, which we review de novo just as we do in appeals from a court of general jurisdiction. *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065, 1067 (Ind. 2006).

As was previously noted, the record before us is devoid of any explanation of the theory by which Vest claimed to be entitled to reimbursement from the Whitsons, and this Court has not been able to conceive of any such theory. Our review of the record reveals no basis for the judgment of $3230 in favor of Vest. At the time Fifth Third Bank repossessed the vehicle, Vest had enjoyed its use for two years and ten months. Fifth Third Bank sold the vehicle for $4283, an amount less than the amount still owed to Fifth Third Bank. The vehicle had a negative value, and therefore, as a matter of law, Vest could not have suffered a loss by reason of the bank's repossession of the vehicle. *See Wineinger v. Ellis*, 855 N.E.2d 614, 619 (Ind. Ct. App. 2006) ("The measure of damages is limited to those actually suffered by the plaintiff, who is not entitled to be placed in a better position than she would have been had the breach not occurred."), *trans. denied* (2005).

We further agree with the Whitsons that it is inequitable to hold them liable for the full amount due to Fifth Third Bank. While the small claims court questioned the Whitsons as to whether they provided Vest with notice as to the vehicle's sale, and it was determined that they had not provided Vest with notice of the sale, Vest did not establish that the Whitsons had any obligation to do so. On the other hand, it was incontrovertibly established that it was Vest's responsibility to make the monthly payments due Fifth Third Bank. Vest admitted that she failed to make the May payment to Fifth Third Bank when it was due. "He who comes into equity must come with clean hands." *Wedgewood Cmty. Ass'n v. Nash*, 781

N.E.2d 1172, 1178 (Ind. Ct. App. 2003) (quotation omitted), *clarified on reh'g*, 789 N.E.2d 495 (Ind. Ct. App. 2003), *trans. denied* (2004). To suppose that Vest was unaware that failure to make the required payments would result in anything other than the bank's repossession of the vehicle strains credulity. Further, we stress that throughout the years that Vest made payments to the bank, she enjoyed the full use of the vehicle.

Based on the foregoing, we conclude that the judgment of the small claims court is clearly erroneous.

Reversed.

BAKER, C. J., and FRIEDLANDER, J., concur.