

**IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA**

**TICIA A. WEBSTER and
KIMBERLY A. WEBSTER**

CASE NO.: 2011-CV-99
Lower Case No.: 2008-CC-12936

Appellants,

v.

**AUTONATION IMPORTS OF WINTER PARK,
INC., a Florida corporation, d/b/a COURTESY TOYOTA
and COURTESY SCION and SAFECO INSURANCE
COMPANY OF AMERICA, a foreign corporation,**

Appellees.

Appeal from the County Court, in and for Orange
County, Florida, Wilfredo Martinez, County Judge.

Nicholas A. Shannin, Esquire,
for Appellants.

Nancy W. Gregoire, Esquire and Richard A. Ivers, Esquire
for Appellees.

Before HIGBEE, THORPE, MCDONALD, J.J.

PER CURIAM.

FINAL ORDER AFFIRMING LOWER COURT

Appellants, Ticia A. Webster and Kimberly A. Webster (“Websters”) filed a timely appeal of the lower court’s Order Denying Plaintiffs’ and Defendants’ Motions for Attorneys’ Fees and Costs entered on November 17, 2011. This Court has jurisdiction pursuant to section 26.012(1), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument. Fla. R. App. P. 9.320.

Summary of Facts and Procedural History

This appeal arose from a dispute between the Websters who purchased a used vehicle from Appellant, Courtesy Toyota (“Courtesy”). The Websters claimed misrepresentations as to the nature, quality, and condition of the vehicle and that Courtesy’s related business conduct ultimately led to the dispute. Specifically, the Websters claimed that Courtesy misrepresented the condition of the vehicle and sold it to them with aftermarket parts which disqualified it from coverage under the service contract and that Courtesy willfully prepared the retail installment service contract (“RISC”) in such a manner as to not accurately disclose desegregated and non-segregated disclosures.

The dispute resulted in the Websters filing a complaint in the County Court against Courtesy and Safeco Insurance Company of America (“Safeco”) that issued a motor vehicle surety bond on behalf of Courtesy. The case then went to arbitration. In the Websters’ Amended Demand for Arbitration the claims were: Count I - Courtesy’s violations of the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”), Count II - breach of contract, Count III - breach of implied warranty of merchantability, Count IV - breach of implied covenant of good faith and fair dealing, Count V- violation of the Magnuson-Moss Warranty Act, Count VI - violation of the Florida Motor Vehicle Retail Sales Finance Act, and Count VII - statutory surety bond claim against Safeco.

In response to the Amended Demand for Arbitration, Courtesy and Safeco asserted affirmative defenses including: 1) The Websters executed a hold harmless agreement; 2) The Truth in Lending claims were barred by the 1 year statute of limitations; 3) The claims were barred by the doctrine(s) of acceptance of benefits and ratification; 4) The claims were barred by the disclaimer language contained in the Purchase Order and RISC; 5) The claims for

compensatory and benefit of the bargain damages were barred by the limitation of liability provisions in the Purchase Order; and 6) The economic loss rule barred the deceptive trade practices claims.

On April 20, April 21, and July 14, 2009 lengthy hearings were held before the Arbitrator, attorney Barry Miller. On November 19, 2009, the Arbitrator entered the Award of Arbitrator that included detailed findings that the greater weight of the evidence established that COURTESY violated FDUTPA, breached its contract with the Websters, breached its implied warranty of merchantability, and breached its implied covenant of good faith and fair dealing. The Arbitrator also found that Courtesy's affirmative defense that the Truth in Lending claims in Count VI were barred by the 1 year statute of limitations was legally sufficient. Ultimately, the Arbitrator found by a preponderance of the evidence that the Websters were entitled to damages in the amount of \$18,432.20, plus interest. The determination of entitlement and amount of attorneys' fees was deferred to the County Court.

On October 12, 2010, the lower court entered an Order Confirming the Award of Arbitrator and Final Judgment and both parties filed motions for attorneys' fees and costs. Thereafter, a hearing was held on February 16, 2011 addressing the motions for attorneys' fees and costs and supplemental memorandums of law were submitted to the lower court. On November 17, 2011, the lower court entered an order denying both motions for attorneys' fees and costs.

Arguments on Appeal

The Websters argue: 1) They were the prevailing party as to the significant issues in the litigation therefore, the lower court erred by failing to find that they were the prevailing party and that they were entitled to attorney fees and 2) As the party that obtained the award of

damages, they are entitled to all taxable costs incurred. Also, the Websters filed a motion for appellate attorneys' fees. Conversely, Appellees argue that the lower court did not abuse its discretion in denying attorneys' fees and costs to both parties as there were numerous claims/allegations under the counts that the Websters did not prevail on.

Analysis

From review of the facts and subject documents in this case as revealed from the arbitration and court records including the Arbitration Award and the transcript from the February 16, 2011 hearing, and upon review of the numerous memorandums of law in this case and this Court's own research addressing entitlement to attorney fees and costs, this Court finds that the only claim in this case warranting further review as to the entitlement and award of attorney fees and costs is under 501.2105, Florida Statutes (2011) of the Florida Deceptive and Unfair Trade Practices Act. The applicable subsections under this statute state:

- (1) In any civil litigation resulting from an act or practice involving a violation of this part, except as provided in subsection (5), the prevailing party, after judgment in the trial court and exhaustion of all appeals, if any, **may** receive his or her reasonable attorney's fees and costs from the nonprevailing party.
- (2) The attorney for the prevailing party shall submit a sworn affidavit of his or her time spent on the case and his or her costs incurred for all the motions, hearings, and appeals to the trial judge who presided over the civil case.
- (3) **The trial judge may award** the prevailing party the sum of reasonable costs incurred in the action plus a reasonable legal fee for the hours actually spent on the case as sworn to in an affidavit... [*Emphasis added*]

From the plain meaning of this statute, the language stating that the prevailing party "may" receive his or her reasonable attorney's fees and costs from the nonprevailing party and that the trial judge "may" award the prevailing party attorney fees and costs, provides the trial

court with discretion when determining the entitlement and award of attorney fees and costs.¹ Therefore, the abuse of discretion standard of review applies in the instant appeal when reviewing the lower court's ruling.

From review of the record in this case, this Court finds that there was nothing revealed in the record showing that the lower court's ruling denying both motions for attorney fees and costs was erroneous; therefore, there was no abuse of discretion. The lower court's findings and judgment come to the appellate court with a presumption of correctness and will not be disturbed in the absence of a record demonstrating error that is clearly erroneous. *Wright v. Wright*, 431 So. 2d 177 (Fla. 5th DCA 1983); *Zinger v. Gattis*, 382 So. 2d 379 (Fla. 5th DCA 1980).

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The lower court's Order Denying Plaintiffs' and Defendants' Motions for Attorneys' Fees and Costs entered on November 17, 2011 is **AFFIRMED**.
2. Appellants' Motion for Appellate Attorneys' Fees filed March 8, 2013 is **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this 18th day of June, 2013.

/S/

HEATHER L. HIGBEE
Circuit Judge

/S/

JANET C. THORPE
Circuit Judge

/S/

ROGER J. MCDONALD
Circuit Judge

¹ This statute was amended in 1994. Prior to the amendment, the statute stated "shall" instead of "may" in the language addressing the award of attorney fees and costs to the prevailing party.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **Nicholas A. Shannin**, Esquire, The Shannin Law Firm, P.A., 214 East Lucerne Circle, Suite 200, Orlando, Florida 32801, service@shanninlaw.com; **Nancy W. Gregoire, Esquire**, Kirschbaum, Birnbaum, Lippman & Gregoire, PLLC, 1301 East Broward Boulevard, Suite 230, Fort Lauderdale, Florida 33301, Gregoirecourt@kblglaw.com; and **Richard A. Ivers, Esquire**, Law Offices of Richard Ivers, 7451 Wiles Road, Suite 101, Coral Springs, Florida 33071 and 2421 North University Drive, Coral Springs, Florida 33065 ², Richard@iverslawfirm.com on the 18th day of June, 2013.

/S/ _____
Judicial Assistant

² Certificate of Service includes a second address for attorney Richard Ivers that is stated in some of the recent documents in the record, although according to The Florida Bar Directory Mr. Ivers' address is at the first location.