

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 10/04/2011  
RUTH A. WILLINGHAM,  
CLERK  
BY: DLL

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

GARY COLVIN, ) No. 1 CA-CV 10-0528  
 ) 1 CA-CV 10-0651  
 Plaintiff/Appellant, ) (Consolidated)  
 )  
 v. ) DEPARTMENT A  
 )  
 AMERI-NATIONAL CORPORATION dba ) **MEMORANDUM DECISION**  
 HERITAGE BANK, N.A., )  
 ) (Not for Publication -  
 Defendant/Appellee. ) Rule 28, Arizona Rules  
 ) of Civil Appellate Procedure)  
 )

---

Appeal from the Superior Court in Maricopa County

Cause No. CV 2007-009210

The Honorable J. Richard Gama, Judge

**AFFIRMED**

---

Gary Colvin  
Appellant *in Propria Persona*

Round Rock, TX

Bryan Cave, LLP  
By Catherine M. Lockard  
Attorneys for Appellee Ameri-National Corporation

Phoenix

and

Zerger & Mauer, LLP  
By Steven E. Mauer admitted *pro hac vice*  
Attorneys for Appellee Heritage Bank

Kansas City, MO

---

**T I M M E R**, Presiding Judge

¶1 Gary Colvin appeals the trial court's entry of summary judgment in favor of Ameri-National Corporation dba Heritage Bank, N.A. ("Bank") on his claims that the Bank caused him damage by failing to immediately provide him cash in exchange for a validly presented cashier's check. He additionally challenges other rulings related to discovery issues and an award of attorneys' fees. For the reasons that follow, we reject Colvin's contentions and therefore affirm.

#### **BACKGROUND**

¶2 On Sunday, May 20, 2007, Colvin alleges he entered into an agreement to purchase a low mileage 2005 Honda Accord ("Honda") for \$13,500 in cash. Colvin had determined that the Kelley Blue Book value of the vehicle was \$24,000, meaning Colvin would have gotten a good deal. To obtain the required cash and consummate the deal, Colvin planned to cash a cashier's check for \$12,000 he had received in settlement of a dispute with third party Darcomm Supply ("Darcomm"). On Monday, May 21, consequently, Colvin presented the check for payment at the Bank's Tempe branch. A Bank teller told Colvin that the Bank did not usually cash checks and that she could not give him cash, but that he could deposit the funds into one of the Bank's accounts. He explained he did not have an account there, did not want to deposit the check into his own account, and needed the cash for a business transaction. Colvin then spoke with the

branch manager, Patricia McCarty, who, like the teller, informed Colvin she could not cash the check and further informed him that bank policy precluded cashing a check larger than \$1,000 for a non-customer. She suggested he deposit the check into his personal bank account. Colvin advised her that the check was from a lawsuit involving illegal access to and theft from his bank account and he would not allow the remitter to discover his current bank account information.

¶13 Colvin returned home and called the Bank's Scottsdale branch. The Bank's representative told Colvin that the Scottsdale branch likewise could not give him cash for the check because the bank carried no cash. She told Colvin that she could wire the funds into his personal account or order the cash, which would be available on Thursday. Colvin declined, again explaining he did not want the remitter of the check to obtain his account information and that if he did not receive the cash that day he would be unable to complete a business transaction, resulting in a loss of more than \$10,000. He asked if a friend could cash the check for him on Thursday, as he would be out of state, and the Bank representative said only he could cash the check.

¶14 Colvin asserts he was unable to buy the Honda because he did not have sufficient cash on hand. On Tuesday, May 22, therefore, Colvin filed a complaint in superior court against

the Bank and eventually alleged multiple causes of action. The Bank subsequently filed a motion for summary judgment and an offer of judgment in the amount of \$15,000. The offer was not accepted. The court permitted additional discovery pursuant to Arizona Rule of Civil Procedure ("ARCP") 56(f), and disputes arose that resulted in Colvin moving the court for sanctions, which the court denied.

¶15 After the parties completed briefing the summary judgment issues, the court granted the motion regarding all claims except three, which were the subject of materially contested facts. The parties continued to litigate the matter and, after the court set the matter for trial, the Bank moved for summary judgment on the remaining claims on the basis, among others, that Colvin had no evidence to support his claim he was consequentially damaged by not reaping the difference in value between the purchase price for the Honda (\$13,500) and its Kelley Blue Book value (\$24,000). The Bank argued that Colvin's reliance on his own testimony regarding the Honda's condition and its Kelley Blue Book value was insufficient to establish the value of the Honda. The Bank further asserted that the "book value" was inadmissible hearsay. Colvin responded he could properly rely on the Kelley Blue Book to establish his losses and that his interrogatory answers established the vehicle had a "clean" CARFAX or similar report, had low mileage, and was in

"mint" condition. He contended he was not obligated to provide expert testimony regarding the value of the Honda, and that it was the Bank's responsibility to diligently conduct discovery regarding the condition of the vehicle.

¶16 The court granted the Bank's motion, reasoning in part:

Plaintiff argues that the [Kelley] Blue Book schedules and on-line listings for similar vehicles is the evidence he will use to prove the value of the Honda. However, those documents are inadmissible hearsay. . . . [The Kelley Blue Book] might meet a hearsay exception as a learned treatise if relied upon by an expert. See Rule 803(18). However, Plaintiff has not listed any expert.

. . . .

Plaintiff has not identified any witness to testify about the value of the Honda. He intends to prove value through periodicals, and on-line listings. The opinion of the authors of the "[Kelley] Blue Book" or other periodicals or treatises is hearsay and not admissible evidence. Without evidence of the value of the Honda, Plaintiff cannot prove his damages.

One of the elements that Plaintiff must prove at trial are damages. Because Plaintiff has no admissible evidence of the value of the Honda he cannot prove his case.

The court denied Colvin's post-ruling motions seeking a different result.

¶17 What transpires next is procedurally messy and ill-advised. *Hill v. City of Phoenix*, 193 Ariz. 570, 574, ¶ 17, 975

P.2d 700, 704 (1999) (“[T]rial judges, in order to avoid confusion in the appellate process, should not sign separate judgments in cases in which all claims of all parties have been adjudicated.”). The court awarded the Bank ARCP 68(d) sanctions in a signed minute entry that contained ARCP 54(b) language; this order was entered on June 22, 2010. Colvin filed a timely notice of appeal from that order. The court entered final judgment on July 15, granting judgment in the Bank’s favor and awarding \$50,000 as reasonable attorneys’ fees and costs, and again awarded ARCP 68(d) sanctions. On August 7, Colvin filed a timely appeal from the July 15 judgment. Despite this appeal, the court entered signed orders on August 16 and August 24, respectively, that awarded \$35,000 in attorneys’ fees to the Bank but was otherwise repetitive of the July 15 judgment. Colvin filed a notice of appeal from these orders on August 27. We consolidated the appeals.

## **DISCUSSION**

### **A. Summary judgment**

¶18 Colvin argues the trial court erred by granting summary judgment for the Bank, raising several contentions of error. We find the issue regarding damages determinative and therefore address it first.

¶19 Summary judgment may be granted when “there is no genuine issue as to any material fact and [] the moving party is

entitled to a judgment as a matter of law.” Ariz. R. Civ. P. 56(c). In reviewing a motion for summary judgment, we decide de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). We view the facts and the inferences to be drawn from those facts in the light most favorable to the party against whom judgment was entered. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996). We affirm the trial court’s decision if correct for any reason. *City of Phoenix v. Geyler*, 144 Ariz. 323, 330, 697 P.2d 1073, 1080 (1985). We will not disturb the court’s decision on the admissibility of evidence absent a clear abuse of discretion and resulting prejudice. *Gasiorowski v. Hose*, 182 Ariz. 376, 382, 897 P.2d 678, 684 (App. 1994).

¶10 Colvin’s claimed damages consisted of direct damages of \$12,000 representing the value of the cashier’s check and consequential damages for loss of the Honda. Regarding the latter, Colvin sought the difference between the reduced price, for which he contends he could have purchased the Honda, and the Kelley Blue Book price for the vehicle. He argues the trial court erred by ruling that evidence of the Kelley Blue Book is inadmissible hearsay because the document is generally accepted as admissible evidence throughout the United States and falls

within the hearsay exception recited in Rule 803(17), Arizona Rules of Evidence.<sup>1</sup>

¶11 Rule 803(17) includes as an exception to hearsay:

Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

Although Arizona courts have not addressed the question, cases from other jurisdictions establish that the Kelley Blue Book falls within this exception. See *State v. Dallas*, 695 S.E.2d 474, 477 (N.C. Ct. App. 2010); *State v. Shaw*, 86 P.3d 823, 824 (Wash. Ct. App. 2004); *Neloms v. Empire Fire & Marine Ins. Co.*, 859 So. 2d 225, 232-33 (La. Ct. App. 2003); *State v. Erickstad*, 620 N.W.2d 136, 145, ¶ 32 (N.D. 2000) (citing additional cases from other jurisdictions); see also Michael A. Rosenhouse, Annotation, *Construction and Application of Uniform Rule of Evidence 803(17), Providing Hearsay Exception for Market Reports, and Commercial Publications*, 54 A.L.R.6th 593, § 12 (2010). The Bank has provided no authority to the contrary. Accordingly, discerning no reason to depart from the majority

---

<sup>1</sup> The record does not reflect that Colvin explicitly argued to the trial court that the Kelley Blue Book fell within the Rule 803(17) exception, and he has arguably waived the issue on appeal. See *Scottsdale Princess P'ship v. Maricopa County*, 185 Ariz. 368, 378, 916 P.2d 1084, 1094 (App. 1995) (this court considers only those arguments first presented to the trial court). Because we decide the court properly granted summary judgment even assuming the admissibility of the Kelley Blue Book, we address the hearsay ruling.

view, we decide the court erred by excluding evidence of the Kelley Blue Book. Despite reaching this conclusion, however, we conclude the court appropriately entered summary judgment in favor of the Bank.

¶12 As the plaintiff, Colvin bore the burden of establishing his damages with reasonable certainty.<sup>2</sup> *Gilmore v. Cohen*, 95 Ariz. 34, 36, 386 P.2d 81, 82 (1963). Merely citing to the Kelley Blue Book is insufficient to prove the value of the Honda because value under the Kelley Blue Book depends on various factors specific to the particular vehicle. The information in the record regarding the condition of the vehicle at issue consists solely of a statement by Colvin in response to an interrogatory asking him to describe his damages:

[A]t least \$10,000 for the loss of the gain in value I would have obtained had I been able to complete the purchase of the low mileage, mint condition 2005 Honda EX V6 4dr sedan on May 21, 2007 that had a 'clean' CARFAX or similar report (agreed purchase price was \$13,500 and listed retail or 'private seller' price was over \$24,000 per Kelly [sic] Blue Book, local advertisements, Craigs List, and other postings and advertisements [sic]).

---

<sup>2</sup> Colvin argues vigorously in his reply brief that the Bank was responsible for discovering the condition of the Honda. He also implies that the Bank's failure prejudiced his ability to prove his damages. As the party bearing the burden of proof, however, it was incumbent on Colvin to conduct any necessary discovery, such as deposing the Honda's owner or obtaining his affidavit, to prove the Honda's condition and value.

Other than state the make, model, and year of the vehicle, Colvin's statement provides only general information regarding the vehicle's condition. Absent is any statement as to specific mileage, features, accessories, or repairs. Also absent are any photographs or advertisements describing the vehicle, or any affidavit by Colvin indicating he has actually seen the vehicle and so is able to testify as to the vehicle's condition and features. In sum, Colvin failed to produce sufficient foundation to establish damages through reference to the Kelley Blue Book value. See Ariz. R. Evid. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.") Because Colvin eventually recovered the \$12,000 from the Bank, see *infra* ¶¶ 18-22, and he failed to submit sufficient proof of his alleged consequential damages, the trial court appropriately granted summary judgment for the Bank on this alternative basis for all claims.<sup>3</sup> *Geyler*, 144 Ariz. at 330, 697 P.2d at 1080.

---

<sup>3</sup> In light of our decision, we do not address Colvin's arguments concerning the purported limitations placed on his discovery rights as the limitations did not impact Colvin's ability to discover evidence of damages. Likewise, we need not address Colvin's arguments concerning the court's characterization of the Bank's instrument as a "cashier's check," the ability of the Bank to satisfy its obligation by wire transfer, and state of mind. Even assuming Colvin's arguments are well-taken, because he failed to prove damages, the court did not commit reversible error.

## B. Discovery sanctions

¶13 Colvin contends the trial court erred by denying his two motions for imposition of monetary and more severe sanctions against the Bank. We review the court's rulings for an abuse of discretion. See *Jimenez v. Wal-Mart Stores, Inc.*, 206 Ariz. 424, 426, ¶ 5, 79 P.3d 673, 675 (App. 2003).

¶14 On December 8, 2008, Colvin moved the court for sanctions pursuant to ARCP 37(b)(2) and (d) for "severe discovery and pleading abuse." He sought monetary sanctions and asked the court to strike the Bank's answer and enter default judgment against it due to the Bank's repeated instances of "false, deceptive and fraudulent testimony," and deceptive pleadings. Colvin described various sworn statements by two Bank employees, contrasted those statements with other evidence gathered by him, and concluded these employees necessarily gave false and fraudulent testimony. The court denied the motion as premature.

¶15 We do not discern an abuse of discretion. Even assuming Colvin identified genuine inconsistencies<sup>4</sup> between the

---

<sup>4</sup> A cursory review of the motion casts doubt on Colvin's claims of inconsistency. For example, in his motion he asserted no evidence was presented that the Bank ordered and received the \$12,000 cash which he contends proves the falsity of contrary testimony offered by Senior Vice President of Operations,

testimony of the Bank employees and other evidence, these discrepancies alone do not demonstrate that the employees intentionally provided false information or that the Bank itself engaged in bad acts sufficient to justify monetary sanctions or entry of default. See *Wayne Cook Enters. v. Fain Props. Ltd. P'ship*, 196 Ariz. 146, 147-48, 993 P.2d 1110, 1111-12 (App. 1999) (holding that to impose sanction of dismissal, court must find the party itself engaged willfully in bad conduct). The existence and import of these discrepancies is appropriately addressed at trial where the evidence can be fully vetted and the witnesses afforded the opportunity for explanation. The court's ruling preserved Colvin's ability to move for sanctions at that time.

¶16 On February 1, 2010, Colvin moved for sanctions based on allegations of spoliation of evidence and other discovery abuse. The motion asserted the Bank had wrongly failed to preserve e-mails relevant to showing a conspiracy between the Bank and Darcomm. The court struck Colvin's motion without prejudice to re-urging it depending on the results of a forensic examination of certain e-mails to determine when they were created. At the court's direction, Colvin subsequently filed a notice of the preliminary findings of the forensic expert.

---

Geraldine Safcik. Branch manager Patricia McCarty testified, however, that she ordered the cash and that it was delivered.

Colvin represented that the expert was unable to verify the authenticity of an e-mail purportedly sent by Darcomm's president to the Bank, that the expert could not locate the e-mail in a Bank employee's mailbox, and that e-mails were found dating back beyond the Bank's claimed retention period. The court granted the Bank's motion for summary judgment for lack of proof of damages without again addressing spoliation. Colvin did not re-urge his motion for sanctions based on spoliation of evidence.

¶17 Colvin argues his expert found "evidence of an unconscionable policy of e-mail deletion" and an "equally outrageous data retention and back-up policy," thereby justifying relief under the motion. We cannot say the court abused its discretion. Although Colvin filed notice of the expert's preliminary report, Colvin did not re-urge his motion; thus, the court had nothing to rule upon. Additionally, because the record contains no report from the expert, we cannot fault the trial court for failing to revisit the earlier motion of its own accord.

**C. Stipulation regarding \$12,000**

¶18 In Darcomm's bankruptcy proceeding, Colvin accepted \$12,000 from the Bank and surrendered the cashier's check. He argues on appeal that he did so pursuant to a "formal stipulation . . . wherein [the Bank] agreed that his receipt of

the monies . . . would not prejudice him in any manner," in the superior court lawsuit. Colvin argues the trial court erred by ignoring this stipulation and considering his receipt of the \$12,000 as evidence he was not entitled to double recovery from the Bank.

¶19 Transcript excerpts from the bankruptcy proceeding show the bankruptcy court asked the Bank if it would provide the \$12,000 to Colvin in exchange for receipt of the check and arrange to preserve the cashier's check for use in pending litigation. The Bank agreed it would "preserve the instrument," and stated that payment would not "have an impact on the underlying lawsuit" in the superior court. When Colvin was asked if he would accept the funds, Colvin stated that he was willing "as long as there's no prejudice to me to accept it." Colvin acknowledged receipt of the funds and the Bank acknowledged receipt of the check. The court noted that the payment reduced the amount of Colvin's bankruptcy proof of claim against Darcomm.

¶20 Contrary to Colvin's position, the bankruptcy court agreement did not prohibit the Bank from advising the trial court of the payment or deducting the payment from any claimed damages. Construed reasonably, the agreement meant Colvin would not be adversely affected from continuing to seek consequential

damages from the Bank even though he received payment of his direct damages - the \$12,000 represented by the cashier's check.

¶21 Colvin nevertheless contends that the payment he received was from a joint tortfeasor and that under the doctrine of joint and several liability, he is entitled to be paid in full by both Darcomm and the Bank. Colvin is mistaken. Even assuming the Bank and Darcomm are joint tortfeasors and the doctrine of joint and several liability applied, a plaintiff may only recover once under that doctrine. *Herstam v. Deloitte & Touche, LLP*, 186 Ariz. 110, 115, 919 P.2d 1381, 1386 (App. 1996) ("Once the victim fully recovered for his injury from one culpable actor, the victim could not seek another recovery from any other joint actor.").

¶22 The trial court did not err by considering Colvin's receipt of the \$12,000.

#### **D. Attorney fees**

¶23 Colvin next contends the trial court violated public policy by awarding attorney fees that included fees incurred by out-of-state lawyers unlicensed in Arizona. Colvin specifically argues that Steven Mauer, a lawyer unlicensed in Arizona, was responsible for the majority of legal work in the case, and Colvin should not be required to reimburse the Bank for Mauer's fees.

¶24 In his declaration in support of the application for attorney fees, Mauer confirms he is licensed in Missouri and Kansas and not in Arizona, and that he was from the beginning of the action primarily responsible for representing the Bank. Mauer was admitted pro hac vice on February 1, 2010. Colvin does not contend that Mauer appeared in court or filed documents in this case prior to his admission pro hac vice. Colvin contends, however, that preparing pleadings and advising Arizona lawyers constitutes the unauthorized practice of law.

¶25 Ethics Rule 5.5 provides:

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter.

Ariz. R. Sup. Ct. 42, ER 5.5(c). This rule authorizes out-of-state attorneys to provide legal services temporarily in Arizona, provided they associate with active in-state counsel. The Missouri attorneys, who were members of the same law firm as Arizona counsel, have obviously associated with Arizona counsel in this case.<sup>5</sup> The record clearly shows that, both prior to and after Mauer's admission pro hac vice, Arizona counsel actively

---

<sup>5</sup> Since May 2011, Mauer has practiced with the law firm of Zerger & Mauer, LLP.

participated in the litigation. Missouri counsel's assistance in preparing pleadings and advising Arizona counsel did not constitute the unauthorized practice of law. Consequently, the court did not violate public policy by awarding fees incurred by Mauer prior to his admission pro hac vice.

#### **E. Judgments**

¶126 Colvin finally argues the trial court erred by entering the three judgments because the court had not yet ruled on his motion concerning the Bank's request for ARCP 68(d) sanctions and attorney fees and his motion to extend the time to file a response concerning the court's summary judgment ruling. He contends that as a result, he was deprived of the opportunity to present "the full thrust" of his findings about the unlawful use of non-licensed attorneys as well as the "full details and facts" in reference to the stipulation entered into regarding his acceptance of the \$12,000 from the Bank.

¶127 We reject Colvin's argument for two reasons. First, his decision to file additional motions did not prevent him from responding to the Bank's pending motions. The court afforded Colvin ample opportunity to do so. Second, Colvin fails to demonstrate any prejudice from the timing of the entry of the judgments. *See Creach v. Angulo*, 189 Ariz. 212, 214, 941 P.2d 224, 226 (1997) (holding in order to justify reversal error must be prejudicial to complaining party). We have already

determined that the use of attorneys licensed in another state who provide legal services in association with an actively participating Arizona licensed attorney, as was the case here, is not unlawful. As for any additional information regarding the stipulation pertaining to Colvin's acceptance of the \$12,000, Colvin argued or at a minimum mentioned this issue in at least three filings - a motion in limine to exclude any mention of the receipt of the funds, the motion to extend time, and Colvin's reply with respect to his motion to strike the Bank's motions for sanctions and attorneys' fees. Colvin does not explain what other details and facts he would have offered and why he failed to offer them previously. In any event, we have already explained that Colvin cannot collect twice on the same check. Neither of these arguments would have altered the result. The court did not commit reversible error.

¶128 Because the trial court entered three judgments, we are compelled to clarify the import of these entries. Once the court entered the June 22, 2010 ARCP 54(b) judgment awarding ARCP 68(d) sanctions and Colvin appealed, the court lost jurisdiction to make additional rulings concerning those sanctions. *McHazzlett v. Otis Eng'g Corp.*, 133 Ariz. 530, 533, 652 P.2d 1377, 1380 (1982). Consequently, the court lacked jurisdiction to enter an ARCP 68(d) sanction award in the July 15, 2010 judgment, although this appeal is not substantively

impacted as the June 22 judgment reflects the same sanction amount and that judgment is properly before us in 1 CA-CV 10-0528. Once the court entered the July 15 judgment, which finally adjudicated all claims, and Colvin timely appealed, the court lost jurisdiction to act in this case. *Id.* The court therefore lacked jurisdiction to enter the August 16 and 24, 2010 judgments, and those judgments are void. *Id.* Colvin's appeal from those void judgments is similarly flawed as we lack jurisdiction to consider void judgments. *Id.* We therefore dismiss Colvin's appeal from the August 16 and 24 judgments, which this court had joined in 1 CA-CV 10-0651 along with Colvin's appeal from the July 15 judgment.

#### CONCLUSION

¶29 For the foregoing reasons, we reject Colvin's arguments and affirm the trial court's judgments entered June 22, 2010 and July 15, 2010. We dismiss Colvin's appeal from the court's judgments entered August 16 and 24, 2010, as the court lacked jurisdiction to enter those judgments.

/s/  
Ann A. Scott Timmer, Presiding Judge

CONCURRING:

/s/  
Patrick Irvine, Judge

/s/  
Patricia A. Orozco, Judge