

MEMORANDUM OPINION¹

McMurray, J.

This is this case's second excursion through the appellate process. On remand from the previous appeal, this court directed the trial court to reconsider its award of attorney's fees awarded to the plaintiff to determine whether the award included fees incurred in the defense of a counterclaim.

After a hearing on remand, the trial court found that \$2,958.00 was a reasonable attorney fee under the contract made between the parties and made an award accordingly.

In the final judgment, the court awarded judgment against the defendant Dedra Shores in the amount of \$1,464.60 "for the amount owed for the vehicle", and in addition the sum of \$2,958.00 attorney's fees for a total judgment of \$4,422.60.

The appellant claims that the amount of attorney's fees awarded exceeds the amount allowable by the contract between the parties. In making this assertion, the appellant relies specifically on the following provision found in the installment sales contract:

¹See Rule 10(b), Rules of this court.

Collection Costs. If the creditor hires an attorney to collect what you owe, you will pay the attorney's reasonable fee and any court costs. The attorney's fee will not exceed 15% of the amount that you owe.

The appellant asserts that since the court found the amount owed to be \$1,464.60, attorney's fees cannot exceed 15% of that amount. The appellant overlooks the fact, however, that the amount owed at the time the collection process was begun and not the amount owed at the time of the second hearing is the proper amount used to calculate attorney's fees. In his pronouncements from the bench after the second hearing, the chancellor limited the attorney's fees to 15% of \$19,720.00. We do not have a transcript of the evidence before us whereby the chancellor determined that the amount owed was \$19,720.00. We do have, however, a copy of the "Retail Installment Sale Contract" introduced into evidence at the original hearing. Ordinarily in the absence of a transcript or statement of the evidence this court must presume that every fact admissible under the pleadings was found or should have been found in the appellee's favor. As here, however, where we have a portion of the evidence, i.e., the contract, we may notice plain error or affirmative error if such exists.

The contract reflects that the "total sale price" was \$19,720.00 which included the down payment of \$2,500.00 and finance charges of \$5,804.20. The contract further reveals that the unpaid balance at the time the contract was executed was \$11,415.80. Obviously, the down payment was not a part of the amount owed and the finance charges had not been earned. We are of the opinion

that the proper amount upon which attorney's fees should have been calculated is \$11,415.80 (total sale price less down payment less unearned finance charges). Fifteen percent (15%) of \$11,415.80 is \$1,712.37.

Accordingly, we modify the judgment of the trial court to reduce the amount of attorney's fees to \$1,712.37. Costs are assessed to the appellee and this cause is remanded to the trial court for the collection thereof.

Don T. McMurray, J.

CONCUR:

Houston M. Goddard, Presiding Judge

Charles D. Susano, Jr., J.

IN THE COURT OF APPEALS

HERB ADCOX CHEVROLET COMPANY, INC.,)	HAMILTON CHANCERY
)	C.A. NO. 03A01-9506-CH-00207
)	
Plaintiff-Appellee)	
)	
)	
)	
vs.)	HON. HOWELL N. PEOPLES
)	CHANCELLOR
)	
)	
)	
DEDRA D. SHORES and JERRY W. SHORES,)	MODIFIED AND REMANDED
)	
Defendants-Appellants)	
)	
)	
vs.)	
)	
)	
GENERAL MOTORS ACCEPTANCE CORP.)	
)	
Third Party Defendant)	

ORDER

This appeal came on to be heard upon the record from the Chancery Court of Hamilton County and briefs filed on behalf of the respective parties. Upon consideration thereof, this Court is of the opinion that there was error in the trial court.

Accordingly, we modify the judgment of the trial court to reduce the amount of attorney's fees to \$1,712.37. Costs are assessed to the appellee and this cause is remanded to the trial court for the collection thereof.

PER CURIAM