IN THE SUPREME COURT OF MISSOURI
EN BANC

ROYAL FINANCIAL GROUP, LLC,	)	
	)	
Plaintiff/Respondent,	)	
	)	
vs.	)	No. SC90902
	)	
MARGARET A. GEORGE,	)	
	)	
Defendant/Appellant.	)	

Appeal from the Circuit Court
St. Louis County

Hon. Sandra Farragut-Hemphill
Associate Circuit Judge

SUBSTITUTE BRIEF OF RESPONDENT
ROYAL FINANCIAL GROUP, LLC.

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Statement of Facts

This case involves an action by Royal Financial Group, L.L.C. (Royal) to collect a debt from Margaret George (Ms. George) and a counterclaim by Ms. George under the federal Fair Debt Collection Practices Act (FDCPA). At the conclusion of Ms. George's case-in-chief, the trial court found that she had presented insufficient evidence to warrant a finding that Royal had violated the FDCPA.

At trial, Ms. George presented no direct evidence that Royal had acted in bad faith or had no reasonable factual basis for the lawsuit. On appeal, she asks this Court to infer bad faith based on circumstantial evidence, inferences that the trial court obviously did not draw.

Royal filed an action to collect a debt in the associate circuit court of St. Louis County. The caption of the petition identified Royal as the assignee of the Chase Manhattan Bank, N/A. L.F. 5. In accordance with the informal pleading requirements of chapter 517, R.S.Mo., the petition contained only a bare bones allegation of the debt. It alleged that Ms. George had signed a credit card agreement, attached a copy of portions of the agreement, and that she owed $2,209.24 in principal and $727.77 in interest. Id.

Through counsel, Ms. George filed an answer and a counterclaim. The counterclaim largely tracked the language of the FDCPA in alleging that she owed no debt and that Royal had acted "maliciously and without reasonable grounds" in

filing suit. L.F. 12. Like the petition, the counterclaim made bare bones allegations, and pleaded no facts in support of these allegations of bad faith.

Ms. George served discovery on Royal seeking, in great detail, evidence concerning her use of the credit card in question and her payment history. L.F. 19-25. Royal did not respond to that discovery and Ms. George filed a motion to compel, L.F. 15, which the trial court granted. L.F. 36. Ms. George filed two motions to dismiss the petition for failure to respond to discovery. L.F. 32; 35.

In response to the second motion, Royal voluntarily dismissed its petition without prejudice. L.F. 37. Large-volume debt collection firms "often" dismiss small claims when met with resistance, Miller v. Javitch, Block & Rathbone, 561 F.3d 588, 591 (6th Cir. 2009), because the expense of prosecution exceeds the amount of recovery.

The case proceeded to trial on Ms. George's FDCPA counterclaim. The only witnesses on the merits of that counterclaim were Ms. George and her daughter, Karen. Their testimony primarily focused on a series of harassing phone calls that Ms. George allegedly received from some unidentified person or persons and the effect that such calls allegedly had upon her. Tr. 13-17; 21-25. The trial court found that there was no evidence linking these calls to Royal, Tr. 47-48, and Ms. George does not challenge that finding on appeal.

Ms. George did testify briefly about the credit card. She stated that she had a single credit card about nine years ago, though she could not remember the issuer. Tr. 13. She had difficulty remembering other facts as well, such as when

she was served or what she did with the suit papers, a deficiency she attributed to being hospitalized. Tr. 12; 15-16. Her answer as to when the last payment was made on the credit card was equivocal:

> Q: Do you know if you made any payments on a credit card during the past nine or ten years?
>
> A: No.
>
> Q: You did not make any payment?
>
> A: No.

Tr. 13. She presented no direct evidence in support of her claim that Royal acted in bad faith or lacked a reasonable factual basis for the lawsuit.

At the conclusion of Ms. George's case-in-chief, Royal moved for judgment pursuant to Rule 73.01(b). Tr. 37. The basis for the motion was that there was no evidence of wrongdoing by Royal. Tr. 39. After argument by both parties, the trial court sustained the motion. In particular, the trial court found that there was insufficient evidence that Royal had:

- Made "a false representation of the character, amount or legal status of the debt."
- Used "false representations or deceptive means to collect or attempt to collect the debt."
- Attempted "to collect amounts of money not expressly authorized."
- Attempted "to collect an amount not permitted by law."

- Communicated "credit information, which was known or should have been known to be false."
- Prosecuted the action "maliciously and without reasonable grounds."

Tr. 47. The trial court did not render any legal conclusions.

Ms. George has quoted some statements that Royal's counsel made in oral argument before the court of appeals, on the theory that these are judicial admissions that Royal knew that its lawsuit had no merit. Br. at 13-14; 39-40. Counsel did state that Royal dismissed its lawsuit because it had insufficient paper work to prove up the case, in light of authentication difficulties. But he flatly disagreed with that court that Royal had no evidence that the action was legitimate:

> [O]ur client had electronic information in its possession at the time that indicated that it was within the statute of limitations. We didn't have a copy of a hard copy of a statement that had been produced . . . .

Points Relied On

I. The Trial Court Correctly Found That Plaintiff Had Not Adduced Substantial Evidence That Royal Violated The FDCPA.

Chuway v. Nat'l Action Fin. Serv., Inc., 362 F.3d 944 (7th Cir. 2004).

A. The FDCPA Does Not Prohibit Reasonable Debt-Collection Lawsuits.

Jenkins v. Heintz, 124 F.3d 824 (7th Cir. 1977), cert. denied, 523 U.S. 1022 (1998);

Harvey v. Great Seneca Fin. Corp., 453 F.3d 324 (6th Cir. 2006);

Jenkins v. Centurion Capital Corp., 2009 WL 3414248 (N.D. Ill. 2009);

Almand v. Reynolds & Robin, P.C., 485 F. Supp. 2d 1361 (M.D. Ga. 2007).

B. The Trial Court Legitimately Concluded That Ms. George Had Presented No Substantial Evidence That Royal Acted In Bad Faith Or Lacked A Reasonable Basis For The Lawsuit.

White v. Dir. of Revenue, ___ S.W.3d ___, 2010 WL 3269232 (Mo. banc Aug. 3, 2010);

Randall v. St. Albans Farms, Inc., 345 S.W.2d 220 (Mo. 1961);

Jerman v. Carlisle, McNellie, Nini, Kramer & Ulrich, LPA, ___ U.S. ___, 130 S. Ct. 1605 (2010).

II. If The Court Reverses The Judgment, It Must Remand The Case With Instructions To Allow Royal To Present Evidence.

Rule 73.01(b), Mo. R. Civ. P.;

Schulte v. Dir. of Revenue, 995 S.W.2d 509 (Mo. App. 1999);

Harvey v. Great Seneca Fin. Corp., 453 F.3d 324 (6th Cir. 2006).

III. The Trial Court Did Not Abuse Its Broad Discretion In Refusing To Admit Records Of Attorneys' Fees Incurred In An Unrelated Case.

Reid v. State, 192 S.W.3d 727 (Mo. App. 2006);

Scott v. Blue Springs Ford Sales, Inc., 215 S.W.3d 145 (Mo. App. 2006);

Creager v. Chilson, 453 S.W.2d 941 (Mo. 1971).

IV. The Trial Court Did Not Abuse Its Discretion In Denying The Motion For Sanctions As Moot.

Standard of Review

The only real issue on appeal is whether the trial court's factual findings were against the weight of the evidence. Pursuant to Rule 73.01(b), Royal moved for judgment at the close of plaintiff's case in this court-tried case. Tr. 37. The trial court sustained the motion, finding that Ms. George had presented insufficient evidence to establish an FDCPA violation. Tr. 47-48. Such a motion "submit[s] the issue on the merits," Kamil, Decker & Co. v. SMC Props., Inc., 998 S.W.2d 818, 819 (Mo. App. 1999), and cases there cited, and hence Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976), provides the standard of review.

The standards of Murphy v. Carron are well established. This Court must affirm the judgment:

> unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.

536 S.W.2d at 32.

Ms. George does not identify any erroneous declarations or applications of the law. Since the trial court focused exclusively on the facts, and said nothing about the meaning of the FDCPA, no such erroneous declaration or application is possible. Since Ms. George had the burden of proof, the judgment in favor of Royal "could stand without any substantial evidence having been adduced in its favor." Landis v. Sumner Mfg. Co., 750 S.W.2d 466, 470 (Mo. App. 1988)

(Covington, J.). Thus, the only basis for the appeal is that the judgment is against the weight of the evidence.

That is an extremely deferential standard. "The credibility of witnesses **and the weight to be given their testimony** is a matter for the trial court, which is free to believe none, part, or all of their testimony." Herbert v. Harl, 757 S.W.2d 585, 587 (Mo. banc 1988) (emphasis added). Accord, In re Marriage of Crow and Gilmore, 103 S.W.3d 778, 783 (Mo. banc 2003). "The trier of facts has the right to disbelieve evidence, even when it is not contradicted." Healthcare Servs. of the Ozarks, Inc. v. Copeland, 198 S.W.3d 604, 616 (Mo. banc 2006).

Moreover, when weighing the evidence, this Court "accepts all evidence **and inferences therefrom** in the light most favorable to the prevailing party **and disregards all contrary evidence**." MC Dev. Co. v. Cent. R-3 Sch. Dist., 299 S.W.3d 600, 602 (Mo. banc 2009) (emphasis added). Accord, Gateway Foam Insulators, Inc. v. Jokerst Paving & Contracting, Inc., 279 S.W.3d 179, 184 (Mo. banc 2009) (evidence "considered in the light most favorable to respondent, giving him the benefit of all reasonable inferences and disregarding appellant's evidence except as it may support" the judgment).

Faithful application of these principles means that it is virtually impossible for the party with the burden of proof to establish that a judgment in a court-tried case is against the weight of the evidence. This Court's recent opinion in White v. Dir. of Revenue, ___ S.W.3d ___, 2010 WL 3269232 (Mo. banc Aug. 3, 2010), so holds.

In White, the director suspended White's driver's license for driving under the influence. The parties agreed that the only issue was whether the arresting officer had probable cause for the arrest. By statute, the director had the burden of proof on that issue. The trial court found for White. The director argued, inter alia, that this judgment was against the weight of the evidence.

This Court drew a clear distinction between uncontradicted evidence, which the trial court is free to disbelieve, and uncontested evidence, which converts the case from one of fact to one of law. 2010 WL 3269232 at *5. Evidence is uncontested when it involves stipulated facts or judicial admissions. Id. at *7. "To contest evidence, a party need not present contradictory or contrary evidence." Id. Rather, a party may contest evidence by cross-examining the witnesses or arguing bias or lack of credibility:

> Under this analysis, although Mr. White did not testify or introduce exhibits and he stipulated to the results of the blood alcohol test taken at the Henry County jail, Mr. White contested the factual and legal determination of probable cause. . . . Because the director's evidence was contested, the trial court was free to accept or reject any or all of the sergeant's testimony regarding probable cause.

Id. at *10.

This appeal rests on two fundamental premises: that the trial court had to accept Ms. George's version of the facts as wholly true; and that, as a result, Royal could not reasonably have believed that she owed the debt. The first premise

assumes that the trial court found her testimony to be true, when the trial court may very well have disbelieved her. The second requires an inference that the trial court was not obliged to draw and obviously did not.

Ms. George argues that this Court cannot affirm based on lack of credibility unless the trial court made a specific finding to that effect. Br. at 18 citing Rugg v,. Dir. of Revenue, 271 S.W.3d 613, 617 (Mo. App. 2008), and Little v. Vincent, 248 S.W.3d 714, 719 (Mo. App. 2008). These license-revocation cases did not survive White:

> To the extent that these cases or any other prior case applied section 302.535 to create a presumption of validity of the driver's evidence, to place a burden on the driver to produce evidence that controverts or contradicts the director's evidence for the trial court to disbelieve the evidence on a contested issue, or to require written factual findings absent a request by a party, the cases are overruled.

2010 WL 3269232 at *6.[1]

The other issues have to do with the exclusion of evidence and the disposition of a motion for sanctions. Both issues are committed to the sound discretion of the trial court and reviewed for abuse of discretion. In re Care and

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[1] Ms. George's citation of Alhalabai v. Missouri Dep't of Natural Resources, 300 S.W.3d 518 (Mo. App. 2009), Br. at 18, is irrelevant, since the case involved a jury trial.

Treatment of Donaldson, 214 S.W.3d 331, 334 (Mo. banc 2007) (evidence); Fairbanks v. Weitzman, 13 S.W.3d 313, 327 (Mo. App. 2000) (sanctions).

The trial court abuses its discretion only when its ruling is "against the logic of the circumstances and so arbitrary or unreasonable as to shock the sense of justice and indicate a lack of careful consideration." Tyson v. State, 249 S.W.3d 849, 852 (Mo. banc 2008).

Argument

I. The Trial Court Correctly Found That Plaintiff Had Not Adduced Substantial Evidence That Royal Violated The FDCPA.

Ms. George had the burden of proving a violation of the FDCPA. Chuway v. Nat'l Action Fin. Serv., Inc., 362 F.3d 944, 948 (7th Cir. 2004). She claims that, taking the evidence in the light most favorable to the appeal, Royal violated the FDCPA in suing her because (1) she did not owe the debt and (2) the suit was time-barred.

The purpose of the FDCPA was to curb abusive debt collection practices, not to deprive creditors of their right to a judicial remedy. Thus, litigation to collect a debt does not violate the statute unless the creditor had no factual basis for the lawsuit or otherwise acted in bad faith. Ms. George presented no evidence that Royal acted in bad faith or lacked a factual basis for the lawsuit, apart from inferences that the trial court was not obliged to draw.

A. **The FDCPA Does Not Prohibit Reasonable Debt-Collection Lawsuits.**

The FDCPA prohibits the use of any "false, deceptive, or misleading representation" in connection with the collection of a debt. The Supreme Court of the United States has clearly held that filing an unsuccessful lawsuit in an effort to collect a debt does not violate the statute. Rather, as Ms. George's own cases make clear, there is an FDCPA violation only when the creditor has no reasonable basis for the lawsuit.

In Heintz v. Jenkins, 514 U.S. 291 (1995), the Supreme Court held that the FDCPA applies to lawyers engaged in litigation over debt collection. The Court was careful to emphasize, however, that the mere failure of the debt collection lawsuit was not enough to establish liability:

> [W]e do not see how the fact that a lawsuit turns out ultimately to be unsuccessful could, by itself, make the bringing of it an "action that cannot legally be taken ."

514 U.S. at 296.

Similarly, in Krawczyk v. Centurion Capital Corp., 2009 WL 395458 (N.D. Ill. 2009), the Court held:

> Losing or voluntarily dismissing a collection case does not by itself create an FDCPA claim against the creditor and its attorneys. Filing a lawsuit is an authorized method of collecting a debt. . . .
>
> . . . .

> . . . . Centurion had a good faith basis for pursuing its collection action in state court.

2009 WL 395458 at *9-10. Accord, Shubin v. Midland Credit Mgmt., Inc., 2008 WL 5042849 (C.D. Cal. Nov. 24, 2008), at *4 ("the fact that Midland lost at trial does not compel the conclusion that P & F made false representations or engaged in unfair debt collection practices during that litigation").

This interpretation of the statute is essential to serve the legislative purpose. "Obviously, Congress did not intend to eliminate all debt collection practices, only those which it considered unfair." Jenkins v. Heintz, 25 F.3d 536, 538 (7th Cir. 1994), aff'd, 514 U.S. 291 (1995). Indeed, Congress intended to "preserve[e] creditors' judicial remedies." Heintz, 514 U.S. at 296. It should be obvious that the least abusive way to collect a debt is though a court action presided over by a neutral magistrate.

If the price of losing a debt collection lawsuit is an FDCPA counterclaim, however, there is no incentive for the creditor to choose the litigation option over some more coercive means of collection. The Court should not construe the statute to create liability every time a reasonable lawsuit to collect an unpaid debt is unsuccessful.

The Seventh Circuit opinions in Heintz illustrate the rule quite well. The debtor borrowed money to purchase a car. The loan agreement required her to maintain collision insurance on the car and authorized the lender to purchase such insurance at her expense if she failed to do so.

The debtor defaulted on that obligation. She alleged that the lender purchased a financial protection package insuring against her default, not just a basic collision policy. She also alleged that Heintz had used deceptive practices in suing her for the full cost of the insurance:

> [I]f the facts are as Jenkins contends – that Heintz and his law firm **knew** the insurance charge was unauthorized, but tried to pass it off anyway – then she states a claim. . . . **Knowingly** making unauthorized charges in connection with debt collection is at least deceptive and misleading.

25 F.3d at 540 (emphasis added).

On remand from the Supreme Court, the law firm submitted evidence that it did not know that its client had attempted to charge Jenkins for the loan protection insurance and "thus could not have intentionally collected such unauthorized premiums." Jenkins v. Heintz, 124 F.3d 824, 831 (7th Cir. 1997), cert. denied, 523 U.S. 1022 (1998). The Seventh Circuit held that she had offered only "conjecture that defendants knew the nature of the force placed insurance," id., and affirmed a summary judgment for the law firm.

Courts have uniformly recognized that "filing of a lawsuit without the immediate means of proving the debt owed did not constitute a deceptive practice." Harvey v. Great Seneca Fin. Corp., 453 F.3d 324, 331 (6th Cir. 2006). As the Sixth Circuit explained:

> Even when viewed from the perspective of an unsophisticated consumer, the filing of a debt-collection lawsuit without the immediate means of

> proving the debt does not have the natural consequence of harassing, abusing, or oppressing a debtor. *Any* attempt to collect a defaulted debt will be unwanted by a debtor, but employing the court system in the way alleged by Harvey cannot be said to be an abusive tactic under the FDCPA

Id. at 330-31 (emphasis original).

Jenkins v. Centurion Capital Corp., 2009 WL 3414248 (N.D. Ill. 2009), stands for exactly the same proposition. The debtor alleged the law firm knew that it would never be able to prove the debt when it filed the lawsuit. The Court found that to be irrelevant:

> [T]he issue before this Court is not whether Defendants could have ultimately prevailed in the State Court Lawsuit against Plaintiff. Rather, the issue is whether Defendants had a good faith basis to file that suit.

2009 WL 3414248 at *4. Accord, Deere v. Javitch, Block & Rathbone, L.L.P., 413 F.Supp. 2d 886, 891 (S.D. Ohio 2006) (plaintiff "essentially alleges that more of a paper trail should have been in the lawyers' hands or attached to the complaint" but the "FDCPA imposes no such obligation"); Eichman v. Mann Bracken, LLC, 689 F.Supp. 2d 1094, 1100-01 (W.D. Wis. 2010) (FDCPA plaintiff "must allege that defendants' counterclaims are frivolous based on blatant lies or misrepresent a key fact").

As these cases recognize, a lawsuit to collect a debt is not rendered false or misleading just because the debt collector does not have sufficient evidence to prove its claim when it files suit, or even that it ultimately dismisses the suit.

Rather, the key is rather the debt collector pursued its right to initiate a lawsuit in good faith and with reasonable grounds

The same is true for Ms. George's claim that the statute of limitations had run. "To determine whether the FDCPA has been violated in the case at bar, the Court must first determine whether Defendants knowingly and intentionally filed a time-barred suit." Almand v. Reynolds & Robin, P.C., 485 F. Supp. 2d 1361, 1364 (M.D. Ga. 2007). Accord, FIA Card Servs., N.A. v. Gachiengu, 571 F. Supp. 2d 799, 806 (S.D. Tex. 2008) (if "debt collectors could have asserted a good-faith basis to change that law," they "could not have violated the FDCPA").

Indeed, the foundation for Ms. George's argument, Kimber v. Fed. Fin. Corp., 668 F. Supp. 1480 (M.D. Ala. 1987), recognizes as much. Kimber held that the debt collector violated the FDCPA "by threatening her with a lawsuit which the corporation knew or reasonably should have known was time-barred." 668 F. Supp. at 1488. Both of the amicus briefs filed on her behalf acknowledge this legal principle. NACA Br. at 12; MATA Br. at 25.

Ms. George cites several cases for the proposition that the FDCPA statute imposes strict liability, Br. at 26, and that it also applies to deceptive litigation tactics. Br. at 28-29. None of those cases addresses the requirements for imposing liability over a decision to file a debt collection lawsuit. None holds that the mere filing of an unsuccessful lawsuit, in and of itself, supports liability under the FDCPA. In light of Heintz, the cases could not reasonably reach such a result.

The NACA amicus brief squarely recognizes that, in the context of filing a lawsuit, scienter is "an element" of the FDCPA claim and "a departure" from the FDCPA in other contexts. NACA Br. at 12. This good faith safe harbor is essential to provide debt collectors with an incentive to resolve debt collection matters in court as opposed to more coercive methods.

B. The Trial Court Legitimately Concluded That Ms. George Had Presented No Substantial Evidence That Royal Acted In Bad Faith Or Lacked A Reasonable Basis For The Lawsuit.

Under White, the only uncontested facts in the record are that Royal filed a lawsuit to collect a debt and voluntarily dismissed it. All of the cases hold that such evidence, standing alone, is insufficient to establish an FDCPA violation. Ms. George presented no direct evidence that Royal acted in bad faith or without a reasonable basis for its lawsuit. The trial court was not required to credit her testimony, even if uncontradicted, and it most certainly was not required to infer from that testimony that Royal acted wrongfully.

Ms. George's arguments to the contrary simply ignore the standard of review. For example, she complains that the petition did not conform to the fact pleading requirements of Rule 55.05. Br. at 21-22 & n.4. This argument rests on the mistaken "assumption that the Rules of Civil Procedure apply to actions before associate circuit judges, when there is conflict with provisions of Chapter 517."

Chesterfield Fin. Corp. v. N. County Gen. Surgery, Inc., 917 S.W.2d 603, 604 (Mo. App. 1996) (Blackmar, S.J.).

In fact, § 517.031.1 specifically provides that pleadings in associate circuit court shall be informal unless the court otherwise specifies. An informal pleading is adequate it if advises the defendant of the nature of the action and suffices to bar another action for the same debt. Kershner v. Hilt Truck Lines, Inc., 637 S.W.2d 769, 771 (Mo. App. 1982).

Ms. George's complaint that there is no allegation of assignment, Br. at 21, ignores the informal nature of associate circuit court pleading, in which it is not necessary to plead assignment. Kershner, 637 S.W.2d at 771. Moreover, the caption of the case, plainly states that Royal is suing as assignee. L.F. 5.

Similarly, Ms. George argues that Royal's failure to respond to either formal or informal discovery creates a presumption that she owed nothing. Br. at 23-24 citing Morris v. Holland, 529 S.W.2d 948 (Mo. App. 1975). But the trial court did not draw that inference and the Morris opinion emphasizes that this is a factual question for the trial court:

> In our opinion this is peculiarly a controversy for resolution upon the weight of the evidence and the credibility of the witnesses. The defendants contend, and the tenor of their evidence was that Ralph Holland simply transferred the property to his father to prefer his father as a creditor and save the property from foreclosure. The trial court might have accepted this evidence as true, and could have found the transfer perfectly lawful.

529 S.W.2d at 952.

Ms. George claims that her own testimony shows she owed nothing to Royal. Br. at 24-25. That testimony may have been uncontradicted, but it was not uncontested within the meaning of White. Royal cross-examined her, Tr. 18, and argued that her testimony did not satisfy her burden. Tr. 37-39. Moreover, her memory was poor. She repeatedly testified that she did not remember being served with the suit papers or what she had done with them, and she attributed her poor memory to a period in the hospital, Tr. 12; 14-16.

Thus, the trial court may have entirely rejected Ms. George's testimony that she owed nothing. Even if the trial court credited her testimony entirely, that would merely prove that the original claim lacked merit, not that Royal lacked a reasonable basis for believing that it had merit.

Ms. George claims that her evidence established that the statute of limitations had run, because the debt was eight or nine years old. Br. at 25. A partial payment restarts the statute of limitations. Heidbreder v. Tambke, 284 S.W.3d 740, 746-47 (Mo. App. 2009). Once again, Ms. George's brief assumes that the trial court fully credited her ambiguous testimony on the point:

> Q: Do you know if you made any payments on a credit card during the past nine or ten years?
>
> A: No.
>
> Q: You did not make any payment?
>
> A: No.

Tr. 13.

Even if the trial court credited the second answer, that says nothing about Royal's scienter. Counsel for Royal represented to the court of appeals that, at the time Royal filed the action, it had electronic information indicating that the case was within the statute of limitations.

Finally, there was a complete failure of proof with respect to the law in question. Missouri courts can take judicial notice of court records or federal statutes, but they "must be offered in evidence so as to become part of the record." Randall v. St. Albans Farms, Inc., 345 S.W.2d 220, 223 (Mo. 1961). And a trial court "is not required to take judicial notice unless requested." Automotive Leasing Corp. v. Westerhold, 945 S.W.2d 600, 602 (Mo. App. 1997).

Here, Royal raised this very issue in its motion for judgment. Tr. 38 ("they have to put evidence in the record before the Court of what statutes they're seeking to avail themselves of"). Ms. George disagreed with that argument, Tr. 44, but she never offered the FDCPA in evidence nor actually asked the trial court to take judicial notice of it.

Ms. George will, no doubt, protest that this is just a technicality. The FDCPA itself is a highly technical statute and her invocation of it relies on just such technicalities. Sauce for the goose is sauce for the gander. Royal raised a timely objection to her proof and she failed to supply it.

Ms. George argues at length that Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, ___ U.S. ___, 130 S. Ct. 1605 (2010), somehow supports her lawsuit. Br. at 34-39. But Jerman merely held that the affirmative defense set forth in 15 U.S.C. § 1692k(c) does not apply to mistakes of law. The Court did not interpret the FDCPA's "conduct-regulating provisions," 130 S. Ct. at 1622, and it certainly did not hold that the FDCPA imposes strict liability over a decision to file a debt-collection lawsuit.

Ms. George claims that Jerman relieves her of the obligation to prove what Royal knew or should have known. Br. at 37. She does not explain why. If the Supreme Court had intended to overrule its own holding in Heintz that merely losing a debt collection lawsuit does not violate the FDCPA, it would have said so specifically. To the contrary, the Court in Jerman specifically reaffirmed its prior holding that the FDCPA should not be read to "interfer[e] . . . with 'an ordinary debt-collecting lawsuit.'" 130 S. Ct. at 1622 (quoting Heintz, 514 U.S. at 296-97). The Court reiterated:

> As in Heintz, we need not authoritatively interpret the Act's conduct-regulating provisions to observe that those provisions should not be assumed to compel absurd results when applied to debt collecting attorneys.

130 S. Ct. at 1622.

Ms. George bears the burden of proving a violation of the FDCPA. The trial court specifically found that Ms. George had presented insufficient evidence

that Royal had used any false representations or deceptive means or had attempted to collect an unauthorized debt. Tr. at 47.

This appeal asks the Court to redefine the trial court's credibility determinations, redraw its inferences, and reweigh the evidence. Under White, the Court cannot do so. Viewing the evidence and the reasonable inferences therefrom in the light most favorable to the judgment, Ms. George did not prove that Royal violated the FDCPA.

II. If the Court Reverses The Judgment, It Must Remand The Case With Instructions To Allow Royal To Present Evidence.

As previously noted, Royal exercised its right under Rule 73.01(b) to seek judgment at the close of Ms. George's case. The Rule specifically provides that such a motion "does not constitute a waiver" of Royal's "right to offer evidence," and indeed, due process would require that Royal be given an opportunity to put on evidence if the judgment were reversed. Schulte v. Dir. of Revenue, 995 S.W.2d 509, 512 (Mo. App. 1999).

Ms. George claims that Royal's "judicial admissions" during oral argument before the court of appeals obviate the necessity of remand. Br. at 39-40. For a party with the burden of proof to claim that judicial admissions prove her case, the admission has to concede all aspects of the plaintiff's case. Copeland v. Compton, 914 S.W.2d 378, 381 (Mo. App. 1996). Counsel's statements at oral argument in the court of appeals fall far short of that standard.

Counsel acknowledged that Royal dismissed its claim because it has "become very difficult to prove up these cases" due to problems with authentication. But he also told the court of appeals that Royal "had electronic information in its possession at the time the case was filed that indicated it was within the statute of limitations."

Such information is plainly sufficient to establish that Royal had a reasonable basis for filing the initial lawsuit. In Harvey, the creditor filed suit "without the immediate means of proving the debt owed." 453 F.3d at 331. The debtor claimed that this filing violated the FDCPA because "more of a paper trail should have been in the lawyer's hands" at the time of filing. Id. The Sixth Circuit affirmed the district court's order dismissing the FDCPA case, because the "FDCPA imposes no such obligation." Id.

Ms. George also claims that the trial court should preclude Royal from offering any proof because it failed to comply with discovery requirements. Br. at 40. In denying as moot her second motion to dismiss, the trial court obviously believed that the requested information went to the merits of Royal's claim, rather than to the counterclaim. If Ms. George thought that evidence was relevant to her FDCPA claim, she should have advised the trial court of that position. She never did.

In any event, the issue of sanctions for discovery violations rests in the sound discretion of the trial court. Fairbanks v. Weitzman, 13 S.W.3d 313, 327

(Mo. App. 2000). If the case is remanded, it will be up to the trial court to decide whether a sanction is appropriate and, if so, what sanction.

Ms. George also claims that any evidence about Royal's good faith must be limited to the affirmative defense authorized by § 1692k(c), which Royal did not plead. This argument ignores the informal nature of pleadings in the associate circuit court. It ignores Rule 55.33, which authorizes amended pleadings. And it assumes that Ms. George is entitled to recover merely upon proof that the collection action failed, even though all of the cases hold exactly the opposite. Royal is certainly entitled to put on evidence of its good faith if the case is remanded.

III. The Trial Court Did Not Abuse Its Broad Discretion In Refusing To Admit Records Of Attorneys' Fees Incurred In An Unrelated Case.

Point II of Ms. George's brief asserts error in refusing admission of an order in an unrelated case and two affidavits in an unrelated case. Ms. George apparently wanted to introduce these exhibits as proof of the reasonable value of her attorney's time. Tr. 29. If the Court affirms the judgment on the merits, it need not reach this issue.

The affidavits are plainly inadmissible hearsay. "[I]n the absence of a stipulation of the parties, an affidavit may not be treated as evidence." Reid v. State, 192 S.W.3d 727, 731 (Mo. App. 2006). And all three exhibits are cumulative evidence.

Missouri courts regard trial judges as experts on the subject of attorney's fees. Scott v. Blue Springs Ford Sales, Inc., 215 S.W.3d 145, 170 (Mo. App. 2006):

> [G]iven this expertise, and because the trial court tried the case such that it is presumed to be acquainted with all the issues involved, it may set the amount of attorney's fees without the aid of evidence.

Id., and cases there cited. The rejection of cumulative evidence "could not have been prejudicial." Creager v. Chilson, 453 S.W.2d 941, 944 (Mo. 1970).

IV. The Trial Court Did Not Abuse Its Discretion In Denying The Motion For Sanctions As Moot.

Point III of Ms. George's brief complains that the trial court abused its discretion by denying the second motion for sanctions as moot. Instead, she complains that Royal should not be allowed to introduce evidence that would have been responsive to her discovery. Since Royal introduced no such evidence, this issue is also moot unless the Court remands the case.

As previously explained, if the Court does remand, the sanctions issue is for the discretion of the trial court in the first instance. If Ms. George is so minded, she can renew her motion for protective order on remand and the trial court will have the first opportunity to resolve it.

Conclusion

For these reasons, Royal respectfully prays that the Court affirm the judgment in its entirety.

Respectfully Submitted,

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Certificate of Compliance

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 5,820 words, exclusive of the sections exempted by Rule 84.06(b)(2), based on the word count that is part of Microsoft Office Word 2003 SP3. The undersigned counsel further certifies that an electronic copy of the brief has been delivered to the court and counsel of record, and CD/diskette and electronic file have been scanned and are free of viruses.

_____

Mark G. Arnold

Certificate of Service

The undersigned hereby certifies that two true and accurate copies of the foregoing brief and an electronic copy on CD/Diskette were served this 13th day of September, 2010, by first class mail, postage prepaid, address to all counsel of record as follows:

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