

September 7, 2005

Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE TOMMY DEAN JOHNSON and
CANDICE ANN JOHNSON,

Debtors.

BAP No. WY-04-087

TOMMY DEAN JOHNSON and
CANDICE ANN JOHNSON,

Plaintiffs – Appellees,

Bankr. No. 04-20861
Adv. No. 04-2036
Chapter 13

v.

ORDER AND JUDGMENT*

KEITH SMITH, Individually and as
Vice President of M & M Auto Outlet -
Wyoming, Inc.; and M & M AUTO
OUTLET - WYOMING, INC., a
Wyoming Corporation,

Defendants – Appellants.

Appeal from the United States Bankruptcy Court
for the District of Wyoming

Before CLARK, BOHANON, and MICHAEL, Bankruptcy Judges.

MICHAEL, Bankruptcy Judge.

This is the story of a truck and those who would possess it. Tommy Dean and Candice Ann Johnson (“Debtors” or the “Johnsons”) bought a 1995 Chevrolet Truck (the “Truck”) from M & M Auto Outlet (“M & M”). Almost immediately,

* The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

things began to go awry. Eventually, the Johnsons filed a bankruptcy petition. After the bankruptcy case was filed, M & M took the Truck. Counsel for the Johnsons contacted M & M and told M & M, in no uncertain terms, to return the Truck. M & M refused to do so voluntarily. Much litigation followed, the end result of which was the return of the Truck and the award of damages to the Johnsons and against M & M and its Vice President, Keith Smith (“Smith”). In addition, M & M was denied relief from the automatic stay to enforce its interests in the Truck. Upon review, we affirm in part, reverse in part, and remand for further proceedings.

I. Background

On March 30, 2004, the Johnsons purchased the Truck from M & M pursuant to a Retail Installment Contract and Security Agreement (the “Sales Contract”). The Sales Contract was signed by the Johnsons and M & M. The Debtors took possession of the Truck and were given a bill of sale executed by M & M. The bill of sale contained no contingencies.¹ Pursuant to the Sales Contract, the Johnsons agreed to pay M & M a total of \$13,000, with a down payment of \$2,300 and with the balance financed. Under the terms of the Sales Contract, M & M was listed as the seller, and the Johnsons were to make payments under the Sales Contract to the seller.² The Sales Contract also contained no contingencies. The Debtors were told by M & M that Wells Fargo Financial (“Wells Fargo”) would ultimately finance their purchase. Although a section of the Sales Contract provided for its assignment to Wells Fargo, Wells Fargo was not a party to the Sales Contract or to any separate assignment agreement.

¹ Although the parties testified to the existence of this bill of sale, a copy of the bill of sale was not made part of the record on appeal.

² Appellants’ App. at 104.

Under the Sales Contract, the Debtors were required to make monthly payments beginning on April 30, 2004, to M & M or its assignee. The Debtors understood that payments would be made to Wells Fargo. They were told by M & M that Wells Fargo would contact them within ten days of the Sales Contract. The Debtors assumed, based on prior car purchases from M & M, that the financing had been approved and that the purpose of this call was to inform the Debtors where to make their payment. Wells Fargo either did not call the Debtors or was unable to contact them. As the April 30th payment date approached, the Debtors contacted Wells Fargo to learn how to make a payment, but were told that Wells Fargo did not have an account for them.

The Debtors then went to M & M, who requested additional identification information from them and promised to provide them with information on how to make payment. The Debtors gave M & M all of the requested information. They did not, however, make their April 30, 2004, payment. Mr. Johnson testified that he did not make a payment to M & M because he was told and believed that the Truck was financed by Wells Fargo, and that he did not make a payment to Wells Fargo because he had not been provided an account number or told where to make the payment. Both Debtors testified to their belief that the purchase of the Truck had been financed by Wells Fargo.

On May 6, 2004, only days after the first payment on the Truck became due, the Debtors filed their Chapter 13 petition. When M & M called Mrs. Johnson at work days after the petition was filed, she did not inform them of the bankruptcy filing. Mrs. Johnson testified that she did not say anything to M & M about the bankruptcy because she did not want people at work knowing her business. Mrs. Johnson also never called M & M to inform them of the bankruptcy because "I didn't think they had anything to do with it other than, you know, Wells Fargo telling them that they couldn't get in contact with us. I didn't

think they had anything to do with the bankruptcy. I thought it was Wells Fargo.”³

A Notice of Chapter 13 Bankruptcy Case was served on the Debtors’ creditors, including M & M and Wells Fargo. The Debtors scheduled Wells Fargo as a secured creditor, and M & M as an unsecured creditor (as a possible “guarantor” of the debt).⁴ In their proposed Chapter 13 plan, the Debtors alleged that Wells Fargo had not properly perfected a lien on the Truck, and that, unless Wells Fargo admitted that fact, Debtors would avoid the lien held by Wells Fargo on the Truck pursuant to 11 U.S.C. § 522(f).

Upon learning of the Chapter 13 case, Wells Fargo declined to finance the Debtors’ purchase of the Truck. On May 10 or 13, 2004, M & M repossessed the Truck. On May 13, 2004, the Debtors’ counsel called M & M and spoke to Smith, requesting that M & M turn the Truck over to the Debtors. Smith refused to return the Truck. Smith testified that the attorney was rude and, therefore, he was suspicious that the Debtors were attempting to improperly recover the Truck.

M & M’s refusal to turn over the Truck resulted in a smorgasbord of litigation. On May 20, 2004, the Debtors filed a Complaint against M & M, seeking an order declaring the Truck to be property of the estate, requiring M & M to turn the Truck over to the Debtors, awarding attorney’s fees and costs incurred by the Debtors, and awarding any damages or sanctions deemed proper (the “Adversary Proceeding”). On the same day, the Debtors filed a motion for a temporary restraining order (the “TRO Motion”) in the Adversary Proceeding, seeking the immediate turnover of the Truck.⁵

On May 25, 2004, the bankruptcy court held a hearing on the TRO Motion

³ Transcript at 33, in Appellants’ App. at 217.

⁴ Appellants’ App. at 140–41.

⁵ Appellants’ App. at 114.

and entered an order in the Adversary Proceeding granting that motion (the “TRO”). Specifically, the court concluded that possession of the Truck should be returned to the Debtors because M & M had wrongfully repossessed it. The court ordered M & M to “deliver the motor vehicle to the Chevrolet garage in Gillette, Wyoming, the place of the [Debtors’] choice, not later than close of business . . . on Friday, May 28, 2004.”⁶ It declined to address damages, stating that it would do so after further proceedings.

On May 28, 2004, the Debtors filed a motion for turnover in the Adversary Proceeding, requesting that M & M deliver title to the Truck to the Debtors (the “Turnover Motion”). The Debtors also moved to amend their Complaint in the Adversary Proceeding to include turnover of the title as a request for relief (the “Amendment Motion”). Also on May 28, 2004, the Debtors went to the garage identified in the TRO to pick up the Truck. They were unable to do so because the garage mistakenly informed them that it did not have the Truck. Accordingly, on June 1, 2004, the Debtors filed a “Motion for Expedited Impositions [sic] of Sanctions and Order Directing Marshall to Collect Property” in the Adversary Proceeding (the “Collection Motion”), requesting that M & M turn over the Truck and sanctions.

At an expedited hearing on the Collection Motion, it was discovered that M & M had in fact delivered the Truck as ordered in the TRO. The Debtors thus amended their Collection Motion to seek, as in their Turnover Motion, an order requiring M & M to turn over title to the Truck. On June 1, 2004, the bankruptcy court granted the Amendment Motion, thus allowing the Debtors to amend their Complaint to include the request that M & M be ordered to deliver title to the Truck. An Amended Complaint was filed, requesting (1) turnover of the Truck; (2) turnover of title to the Truck; and (3) damages for willful violation of the stay.

⁶ Appellants’ App. at 47.

The Amended Complaint contained no cause of action to avoid M & M's lien on the Truck. On June 8, 2004, M & M filed a motion in the Adversary Proceeding to dismiss the Debtors' Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The bankruptcy court entered an order denying that motion (the "Dismissal Order").

On or about June 2, 2004, the Debtors gained possession of the Truck. However, they were unable to use the Truck because M & M had not given them a certificate of title, and, therefore, they could not register the Truck for use on public highways. In the eyes of the Debtors, they had won the battle but not the war, as an unlicensed truck is not a viable means of transportation.

On June 14, 2004, M & M filed a motion for relief from stay in the Debtors' main case ("Stay Relief Motion"). In this motion, M & M argued that the Sales Contract terminated prepetition as a result of the Debtors' breach thereof. Thus, the Truck was not property of the Debtors' estate, and M & M should not have been required to deliver the Truck or its title to the Debtors. Alternatively, M & M maintained that the Sales Contract was an executory contract, and that if the Debtors were to assume it, M & M would have the right to perfect its lien on the Truck. On July 13, 2004, the bankruptcy court held a hearing on the Debtors' Turnover Motion and Collection Motion, and on M & M's Stay Relief Motion. At the close of the evidence, the bankruptcy court took the matter under advisement.

On July 30, 2004, the court entered an Order Requiring Turnover (the "Turnover Order") in the Adversary Proceeding, granting the Debtors' Turnover Motion, thus requiring M & M to turn over title to the Truck to the Debtors. The court also entered its order denying the Stay Relief Motion (the "Stay Relief Order") in the main case. Finally, the bankruptcy court entered a Decision on Debtors' Amended Complaint for Turnover, Sanctions and Injunctive Relief (the

“Decision on Complaint”) in the Adversary Proceeding, which provided that its findings of fact and conclusions of law related to both the Turnover Order and the Stay Relief Order. In the Decision on Complaint, the court concluded that:

- (1) the Sales Contract was not an executory contract;
- (2) the Truck was property of the Debtors’ estate;
- (3) title to the Truck must be turned over to the Debtors; and

(4) M & M had willfully violated the automatic stay when it refused to turn the Truck over to the Debtors after having been told of their Chapter 13 case. Although damages were mandated under § 362(h), the court did not have evidence as to the amount of damages, and, therefore, it scheduled an evidentiary hearing on the issue of damages for October 5, 2004.

Pursuant to the Turnover Order and the Decision on Complaint, on August 19, 2004, M & M issued to the Debtors a new title reassignment (the “M & M Title”). The M & M Title noted that M & M, not Wells Fargo, held a lien on the Truck as of March 30, 2004.⁷ When Mr. Johnson attempted to register and license the Truck with the M & M Title, he was told that because of the notation of M & M as a lien holder, registration would not occur unless he obtained a lien release or a copy of the security agreement. M & M faxed a copy of the Sales Contract to the state official, but the Truck was never registered because Mr. Johnson, angered by M & M’s attempt to claim a lien, refused to pay the taxes or register the Truck. As a result, the Debtors did not drive the Truck. Instead, they borrowed a vehicle owned by one of their sons for their transportation needs.

On October 5, 2004, the bankruptcy court held the hearing to determine damages for M & M’s willful violation of the stay. The Johnsons presented the evidence of their damages and attorney’s fees, all of which was objected to by M

⁷ The bankruptcy court found that the M & M Title showed a lien in the amount of \$0.00. Order on Damages at 2, in Appellants’ App. at 22. M & M states that it noted the amount as approximately \$10,800. Appellants’ Brief at 8.

& M. With respect to damages for loss of use of the Truck, the Johnsons attempted to produce evidence of the daily rate for truck rental from a national car rental chain. The evidence was in the form of information apparently downloaded from an internet web site. This evidence was objected to and not admitted. Mr. Johnson also testified that he had driven his son's minivan approximately 2,500 miles to appear in court and to travel to his chemotherapy treatments. He admitted that he had made no payments to his son for the use of the vehicle.

With respect to the attorney's fees allegedly incurred as a result of the stay violation, Mr. Johnson was shown a fee statement. Mr. Johnson testified that he had previously received the fee statement from his attorney. On the basis of that identification, the exhibit was offered. Appellants objected to the admission of the fee statement on the basis that Mr. Johnson was not the proper witness to testify as to the nature of services performed, and that he was not able to provide a proper foundation for the exhibit, since he neither created it nor did he perform the work identified therein. The objection was summarily overruled.

On November 17, 2004, the bankruptcy court entered its Order on Damages ("Order on Damages"), ordering M & M to provide the Debtors with a release of the lien on the Truck, and awarding the Debtors damages in the total amount of \$6,198.23. The court awarded the Johnsons \$937.50 to compensate them for the loss of use of the Truck. This amount was calculated based upon the use of their son's car to drive 2,500 miles at a rate of 37.5 cents per mile, without explanation of how the per mile figure was arrived at. In addition, the court, after a detailed review of the fee statement submitted into evidence by the Johnsons, awarded attorney's fees in the amount of \$5,028.50 and costs in the amount of \$232.23. The court also awarded the Debtors a sales tax penalty, if any.

M & M appealed the Order on Damages, the Dismissal Order, the Turnover Order, the Decision on Complaint, and the TRO within ten days of entry of the

Order on Damages. The docket sheet indicates that M & M sought a stay pending appeal on January 18, 2005, but that the motion was denied by the bankruptcy court. No stay pending appeal was ever sought from this court.

II. Jurisdiction

This Court has jurisdiction to hear timely-filed appeals from “final judgments, orders, and decrees” of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.⁸ Neither party elected to have this appeal heard by the United States District Court for the District of Wyoming, thus consenting to review by this Court, assuming the notice of appeal was timely filed.

One of the orders we have been asked to review is the Stay Relief Order, entered on July 30, 2004.⁹ The notice of appeal was filed on November 29, 2004, which is far more than ten days after entry of this order. Thus, a question exists whether the Stay Relief Order was timely appealed, and, if not, whether this Court has jurisdiction to entertain the appeal.

III. Standard of Review

This Court has previously held that:

“Whether a party’s actions have violated the automatic stay is a question of law which is reviewed *de novo*.” *Barnett v. Edwards (In re Edwards)*, 214 B.R. 613, 618 (9th Cir. BAP 1997) (citations omitted). We review the bankruptcy court’s finding that a creditor’s action constituted a willful violation of the stay for clear error. *McHenry v. Key Bank (In re McHenry)*, 179 B.R. 165, 167 (9th Cir. BAP 1995); *Franchise Tax Bd. v. Roberts (In re Roberts)*, 175 B.R. 339, 343 (9th Cir. BAP 1994). An award of sanctions for a violation of the automatic stay is reviewed for an abuse of discretion. *Edwards*, 214 B.R. at 618.

Under the abuse of discretion standard, a trial court’s decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court

⁸ 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-1.

⁹ See *infra* note 14 and accompanying text.

made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances. When we apply the “abuse of discretion” standard, we defer to the trial court’s judgment because of its first-hand ability to view the witness or evidence and assess credibility and probative value.

United States v. Ortiz, 804 F.2d 1161, 1164 n.2 (10th Cir. 1986); *see also Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (quoting and applying this standard); *McEwen v. City of Norman*, 926 F.2d 1539, 1553-54 (10th Cir. 1991) (same). An abuse of discretion may occur if a court bases its ruling on a view of the law that is erroneous. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990).¹⁰

We see no basis to depart from the standard of review outlined in *Diviney*.

IV. Discussion

Appellants have outlined the following issues on appeal:

- (1) Whether the bankruptcy court erred in determining that the Sales Contract was not an executory contract;
- (2) Whether the bankruptcy court erred in refusing to grant the Stay Relief Motion;
- (3) Whether the Johnsons have standing to avoid the lien held (or claimed) by M & M on the Truck;
- (4) Whether the bankruptcy court erred in requiring M & M to deliver to the Johnsons title to the Truck without any notation of lien by M & M;
- (5) Whether the Johnsons established by clear and convincing evidence that M & M and/or Smith violated the automatic stay provisions of 11 U.S.C. § 362;
- (6) Whether the bankruptcy court abused its discretion in awarding the Johnsons damages for their lost use of the Truck; and
- (7) Whether the bankruptcy court abused its discretion in awarding the

¹⁰ *Diviney v. NationsBank (In re Diviney)*, 225 B.R. 762, 769 (10th Cir. BAP 1998).

Johnsons their attorney's fees and expenses.

We will consider each argument in turn.

A. The Sales Contract as Executory

Appellants claim that the Sales Contract was an executory contract that the Debtors breached prior to the filing of the bankruptcy case. Appellants contend that, as a result of the pre-petition breach, Debtors had no interest in the Truck as of the commencement of the case, and the Truck never became property of the bankruptcy estate. If the Truck was not property of the bankruptcy estate, the argument goes, retention of the Truck by M & M cannot constitute a violation of the automatic stay.

The bankruptcy court rejected this argument:

The Debtors performed by paying their down payment and granting M&M a security interest. They also provided the electric and telephone bills requested subsequent to the signing of the Contract. The failure of Wells Fargo to conduct the telephone interview and of M&M to record a lien on the title cannot be attributed to the Debtors. Their only remaining obligation is the payment of money pursuant to the installments set forth in the Contract.

Nor is a default in payment a material breach which terminates the seller's obligations. M&M has remedies for a default in payments, which it exercised.

From M&M's perspective, the only performance remaining is delivery of an executed title to the Debtors. Wyoming law is useful in determining whether that obligation is material, and the court concludes it is not. Under the Wyoming Motor Vehicle act, the owner of a vehicle is: "[t]he legal owner; or [a] person, other than a lienholder, having the property in or title to a vehicle including a person entitled to use the possession of a vehicle subject to a security interest in another person. . . . Wyo. Stat. Ann. § 31-1-101(a)xviii (LexisNexis 2003). Delivery of the title is not a material obligation, because the Debtors are already the owner of the [Truck].

Other factors compel the same conclusion. First, M&M delivered possession of the [Truck] to the Debtors, and signed and delivered a Bill of Sale. M&M argues that the Bill of Sale contains an unfulfilled contingency which somehow excuses M&M from performance under the Contract. The court disagrees. To be binding, the Bill of Sale requires acceptance by the "Dealer." M&M's representative, Kim Carroll, signed the Bill of Sale. The sale was accepted by the Dealer. Nothing in that document requires

acceptance by the seller's proposed assignee, Wells Fargo Financial.

Second, by the terms of the Contract, performance is not conditional on Wells Fargo's acceptance of the seller's assignment. Wells Fargo is not even a party to the Contract. Although the debtors were aware Wells Fargo was to be the financing lender, the evidence does not support the view that the Debtors deliberately sabotaged the assignment to Wells Fargo as argued by M&M.¹¹

Appellants point to the fact that there was testimony from representatives of M & M to the effect that the Sales Contract was not final until all steps had been taken to ensure that Wells Fargo would accept an assignment of the Sales Contract. The bankruptcy court rejected this argument, noting that the Sales Contract contained no such restriction. We cannot find reversible error in the bankruptcy court's reliance upon the express terms of the Sales Contract. Thus, the ruling of the bankruptcy court that the Sales Contract was not terminated prepetition is not subject to reversal. It follows that the Truck was property of the Debtors' estate that was protected by the automatic stay under § 362.¹² Accordingly, Appellants' argument that the automatic stay does not apply to the Truck is without merit. The Truck was property of the Debtors' estate, and M & M violated the automatic stay by attempting to exercise control over that property.¹³

¹¹ Appellants' App. at 37-38.

¹² See 11 U.S.C. § 362(a)(3).

¹³ Both the Appellants' Notice of Appeal and Brief list the "Order Denying Motion to Dismiss" (here referred to as the Dismissal Order) as one of the orders subject to this appeal. However, Appellants' Brief contains no argument describing the error assigned to the Dismissal Order. The crux of the Motion to Dismiss is that the Debtors were improperly attempting to assume an executory contract in the adversary proceeding instead of through a separate contested matter. Appellants' App. at 88. Appellants were given a full opportunity to present evidence and argument in support of their claim that the Sales Contract was executory. The bankruptcy court, after hearing the evidence and argument, found that the Sales Contract was not an executory contract. Having found no error in the bankruptcy court's decision after its review of the evidence, we cannot find error in the bankruptcy court's failure to grant the motion to dismiss.

B. Relief From the Automatic Stay

The Stay Relief Order is not among those listed in either the Notice of Appeal or the Brief as being specifically appealed.¹⁴ Despite this omission, Appellants argue that the bankruptcy court erroneously denied M & M's relief motion,¹⁵ and ask this Court to "remand this matter with instructions that the automatic stay be modified because of the prepetition termination of the parties' executory contract."¹⁶ This Court believes that the Stay Relief Order was not properly appealed and that we lack jurisdiction to review it.

An order is final when it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."¹⁷ Thus, a final judgment is one that terminates "all matters as to all parties and causes of action."¹⁸ M & M's Stay Relief Motion sought (1) an order holding that the stay did not apply, or (2) an order holding that the Sales Contract was an executory contract that must be assumed or rejected by the Debtors. These issues were all finally decided on July 30, 2004, when the bankruptcy court denied the Stay Relief Motion. The fact that the Stay Relief Order was entered in conjunction with the Adversary Proceeding, however, does not make it part of the Adversary Proceeding—it resolved the Stay Relief Motion filed in the main case and was docketed in the main case.

The Stay Relief Order was a final order when it was entered. It is well-established that orders denying relief from stay requests and orders determining

¹⁴ Appellants' App. at 19; Appellants' Brief at 2.

¹⁵ Appellants' Brief at 12.

¹⁶ *Id.* at 20.

¹⁷ *Catlin v. United States*, 324 U.S. 229, 233 (1945), *quoted in Van Cauwenberghe v. Biard*, 486 U.S. 517, 521 (1988).

¹⁸ *D&H Marketers, Inc. v. Freedom Oil & Gas, Inc.*, 744 F.2d 1443, 1444 (10th Cir. 1984).

whether a contract is executory are final orders.¹⁹ M & M failed to file a notice of appeal within ten days after entry of that Order. Thus, the Court does not have jurisdiction to review the Stay Relief Order. To the extent Appellants ask us to review the Stay Relief Order, we decline to do so.

C. The Issue of the Alleged Lien Avoidance

Appellants argue that, even if its ruling regarding the violations of the automatic stay are correct, the bankruptcy court improperly ordered M & M to release its lien upon the Truck. Appellants claim that the Turnover Order that ordered M & M to deliver the title to the Johnsons without the notation of a lien is tantamount to a lien avoidance action. Appellants claim that: (1) the issue of lien avoidance was never properly raised; (2) as a matter of general law, Debtors in Chapter 13 cases lack standing to bring lien avoidance actions under § 522 of the Bankruptcy Code; and (3) even if M & M violated the automatic stay by taking possession of the Truck, it had the right to note its lien upon the title after the bankruptcy case was filed. We disagree with all three contentions.

Appellants correctly state that “[a]ssuming that M & M was granted a lien, albeit unperfected, against the vehicle on March 30, 2004, as the Bankruptcy Court decision holds, that lien survives until it is avoided, paid or modified.”²⁰ The issue is not whether M & M is entitled to its unperfected lien, which it is (for whatever it might be worth). The issue is whether M & M is entitled to perfect that lien after the bankruptcy case was filed. Article 9 of the Wyoming Uniform Commercial Code states that perfection of a motor vehicle is done in compliance

¹⁹ *Franklin Sav. Ass’n v. Office of Thrift Supervision*, 31 F.3d 1020, 1022 n.3 (10th Cir. 1994) (Bankruptcy court orders granting or denying relief from an automatic stay are appealable final orders.); *Eddleman v. United States Dept. of Labor*, 923 F.2d 782, 784 (10th Cir. 1991) (same), *overruled on other grounds*, *Temex Energy, Inc. v. Underwood, Wilson, Berry, Stein & Johnson*, 968 F.2d 1003 (10th Cir. 1992). See also *City of Olathe v. KAR Dev. Assocs. (In re KAR Dev. Assocs.)*, 180 B.R. 629 (D. Kan. 1995).

²⁰ Appellants’ Brief at 12 (citations omitted).

with Wyoming law.²¹ Perfection of a security interest in a motor vehicle occurs in Wyoming when two “steps” are taken:

- (i) A financing statement or security agreement must be filed in the office of the county clerk . . . ; and (ii) A notation of the security interest must be endorsed on the certificate of title to the vehicle or motor vehicle, the endorsement to be made concurrently with the filing of the financing statement or security agreement.²²

When M & M noted its lien upon the M & M Title and faxed its security agreement to the county clerk, it was acting to perfect a prepetition lien in violation of the automatic stay. M & M’s attempt to note its lien on the title was an attempt to perfect its prepetition lien after the filing of the bankruptcy case and violated § 362(a)(4), and, as such, was void as a matter of law.²³ The bankruptcy court did not err in ordering M & M to remove its notation of lien from the M & M Title reassignment. The issues of standing to seek lien avoidance and procedural irregularity are not present in this case. We need not and do not reach them.

²¹ Wyo. Stat. Ann. § 34.1-9-303(c).

²² *Id.* § 31-2-801(a).

²³ 11 U.S.C. § 362(a)(4) states:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

. . .

(4) any act to create, perfect, or enforce any lien against property of the estate[.]

§ 362(a)(4). The bankruptcy court discussed avoidance—assuming that any lien would be avoidable. Avoidance (and the lack of an adversary proceeding and the Debtors’ standing to bring such an action), however, need not be addressed because M & M’s actions made in violation of the stay are void as a matter of law.

D. *Proof of a Violation of the Automatic Stay under the “Clear and Convincing Evidence” Standard*

Appellants contend that the Johnsons failed to establish that M & M and/or Smith violated the automatic stay through their continued possession of the Truck. They suggest that the bankruptcy court was required to find that such a violation had taken place by “clear and convincing” evidence, relying on two decisions, one of which had been affirmed by this Court.²⁴ Upon review, this Court finds that the proper standard for establishment of a violation of the automatic stay is the preponderance of the evidence standard.

The majority of the courts considering the proper standard of evidence to be applied in stay violation cases have applied the “preponderance of the evidence” standard.²⁵ Those courts have relied upon the decision of the United States Supreme Court in *Grogan v. Garner*,²⁶ wherein the Court stated:

Because the preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between litigants, we presume that this standard is applicable in civil actions between private litigants unless “particularly important individual interests or rights are at stake.”²⁷

In *Grogan*, the plaintiff brought an action under § 523(a)(2)(A) of the Bankruptcy Code, seeking to have a debt declared non-dischargeable due to fraud. We see no reason to apply a more strenuous standard here, where the Johnsons are seeking to enforce the protections of the automatic stay granted to them by Congress. To the

²⁴ *Diviney v. NationsBank (In re Diviney)*, 211 B.R. 951 (Bankr. N.D. Okla. 1997) *aff’d*, 225 B.R. 762 (10th Cir. BAP 1998); *Bolen v. Mercedes Benz, Inc. (In re Bolen)*, 295 B.R. 803 (Bankr. D.S.C. 2002).

²⁵ *Westman v. Andersohn (In re Westman)*, 300 B.R. 338, 342 (Bankr. D. Minn. 2003); *Clayton v. King (In re Clayton)*, 235 B.R. 801, 806-07 (Bankr. M.D.N.C. 1998); *Estep v. Fifth Third Bank of N.W. Ohio (In re Estep)*, 173 B.R. 126, 129 (Bankr. N.D. Ohio 1994).

²⁶ 498 U.S. 279 (1991).

²⁷ *Id.* at 286 (quoting *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389-90 (1983)).

extent the *Bolen* decision is to the contrary, we respectfully disagree with its conclusions.²⁸ In the Decision on Complaint, the bankruptcy court concluded that the automatic stay applied to the Truck, and M & M willfully violated the automatic stay within the meaning of § 362(h) when it refused to return possession of the Truck to the Debtors after being orally informed that the Debtors had filed a Chapter 13 petition. We find no error in these conclusions.

Appellants contend that M & M did not violate the automatic stay when it repossessed the Truck because the Sales Contract terminated prepetition. According to Appellants, the Sales Contract terminated when the Johnsons failed to provide it with certain information and participate in an interview with Wells Fargo. Therefore, say the Appellants, the Johnsons had no interest in the Truck on the date they filed their bankruptcy petition. The bankruptcy court rejected this argument.²⁹ The bankruptcy court's factual findings in this regard are not clearly erroneous. On the basis of its factual findings, the conclusion that the Sales Contract existed and was not terminated prepetition is correct as a matter of law. The Truck was property of the Debtors' estate, and M & M violated the automatic stay by attempting to exercise control over that property.

²⁸ In making this ruling, we are neither disagreeing with nor overruling our prior decision in *Diviney*. In that case, we affirmed the decision of the bankruptcy court that the automatic stay had been violated. However, the issue of the proper standard of proof was not before us. The bankruptcy court applied the clear and convincing evidence standard in finding that a stay violation had occurred. 211 B.R. at 961. The issue of the standard of evidence to be used in stay violation cases was not raised on appeal, nor was it reached by the appellate court on its own accord. Any reliance upon our opinion in *Diviney* for the proposition that the clear and convincing evidence standard applies in stay violation cases is misplaced. Certainly, evidence that satisfies the clear and convincing evidence standard would be more than sufficient to satisfy the preponderance of the evidence standard. Given that the court, on appeal, found the more stringent standard to have been satisfied, there was no need to consider whether a lesser standard should have been applied.

²⁹ See *supra* note 11 and accompanying text.

E. Damages for Lost Use of the Truck

The bankruptcy court awarded the Johnsons the sum of \$937.50 in damages for loss of use of the Truck. The amount was arrived at by multiplying the miles that Mr. Johnson testified he had driven (2,500) by a rate of 37.5 cents per mile.³⁰ The source for the 37.5 cents per mile figure is not apparent from the record. There was no evidence adduced at the trial to support the use of this number.

We agree that “actual damages in the form of some out of pocket loss or expense must be proven with reasonable certainty and that it [a damage award under § 362(h)] cannot be speculative or based upon conjecture.”³¹ Moreover, the burden of proof to establish such damages lies with the party seeking damages.³² In this case, the only evidence before the bankruptcy court regarding damages for the loss of use of the Truck was Mr. Johnson’s testimony that he drove his son’s vehicle approximately 2,500 miles. There was no evidence as to any agreement between Mr. Johnson and his son providing that Debtors would reimburse their son for the use of the vehicle, let alone the terms of any such arrangement. We find the lack of evidentiary support for the award of damages fatal to the award.³³ We thus reverse that portion of the bankruptcy court’s decision that awarded

³⁰ Appellants’ App. at 24.

³¹ *Aiello v. Providian Fin. Corp. (In re Aiello)*, 231 B.R. 684, 689 (Bankr. N.D. Ill. 1999) (citing *In re Archer*, 853 F.2d 497, 499-500 (6th Cir. 1988), *In re Sumpter*, 171 B.R. 835, 844 (Bankr. N.D. Ill. 1994), and *In re Washington*, 172 B.R. 415, 426-27 (Bankr. S.D. Ga. 1994)), *aff’d*, 257 B.R. 245 (N.D. Ill. 2000), *aff’d*, 239 F.3d 876 (7th Cir. 2001).

³² *Lord v. Carragher (In re Lord)*, 270 B.R. 787, 794 (Bankr. M.D. Ga. 1998) (and cases cited therein).

³³ We are unable to take judicial notice that 37.5 cents per mile is an appropriate reimbursement amount. *Cf. Pueblo of Sandia v. United States*, 50 F.3d 856, 862 n.6 (10th Cir. 1995) (appellate court may take judicial notice of official government reports and publications). While the IRS or other government agencies may recognize 37.5 cents per mile as an appropriate reimbursement rate for business miles driven in one’s personal vehicle, there was no evidence before the bankruptcy court that 37.5 cents per mile was an appropriate reimbursement rate for miles driven in a borrowed vehicle.

damages to the Debtors for the loss of use of the Truck.

F. The Award of Attorney's Fees and Costs

The bankruptcy court awarded the Debtors the sum of \$5,260.73 in attorney's fees and costs incurred by the Debtors as a result of the stay violation. Appellants contend that they did not violate the stay and that, accordingly, any fee award is improper. Moreover, they argue, even if an award of fees was permissible under § 362(h), the Johnsons failed to present sufficient evidence to support the award. We find the position advanced by the Appellants persuasive.

At the trial on damages, the Debtors offered into evidence a statement of fees and expenses. The itemization was not verified by Debtors' counsel in any fashion. Said counsel did not testify regarding the fee statement, nor was the statement verified under penalty of perjury.³⁴ The only foundation for the exhibit was the testimony of Mr. Johnson that the statement was a statement of fees that he had received from his attorney.³⁵ Appellants objected to the admission of the

³⁴ See Appellants' App. at 50–58.

³⁵ If anything, this characterization is generous. The actual testimony was as follows, with Debtors' attorney questioning Mr. Johnson:

Q. Have there been attorneys' fees associated with standard [sic] court proceedings?

A. Yes.

Q. Would you identify for me Exhibit A?

A. That's your – the attorneys' fees and costs are.

Q. That includes the 4th of August but not the charges for this particular hearing?

A. Yes.

Q. And not the communications last week relative to the car?

A. Yes.

Q. So within a few dollars, that's the summary of the activity in

(continued...)

fee statement on the basis of lack of foundation, noting that Mr. Johnson did not create the exhibit and was not in a position to testify as to the nature of the services described therein or their reasonableness. The bankruptcy court overruled the objection.³⁶ The threshold question we must address is whether the bankruptcy court erred in doing so. If so, then the bankruptcy court had no evidentiary basis for the fee award, and the fee award must be reversed.

Under Federal Rule of Evidence 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.”³⁷ With respect to the authentication of documents, Federal Rule of Evidence 901(a) requires that, in order for a document to be admitted, there be “evidence sufficient to support a finding that the matter in question is what its proponent claims.”³⁸ This requirement can be satisfied through the testimony of a witness with knowledge “that a matter is what it is claimed to be.”³⁹ While Mr. Johnson knew that his attorney was working for him, and could testify that he was given a bill for services rendered, there is nothing in the record to suggest that Mr. Johnson knew the details of the tasks performed, or had any ability to verify the accuracy of the fee statement. As noted above, the fee statement did not purport to be self-authenticating. The foundation objection advanced by Appellants was well

³⁵ (...continued)
reclaiming this motor vehicle?

A. Yes it is.

Appellants’ App. at 161, lines 5 through 15.

³⁶ *Id.* at 163, lines 2 through 14.

³⁷ Fed. R. Evid. 602.

³⁸ Fed. R. Evid. 901(a).

³⁹ Fed. R. Evid. 901(b)(1).

founded, and should have been sustained. The admission of the fee statement constituted reversible error, as did the award of attorney's fees made on the basis of that statement.

At first blush, this ruling might seem both arbitrary and harsh. Surely, one could argue, everyone at the hearing knew what the fee statement was. Even more surely, bankruptcy judges consider issues regarding the allowance of attorney's fees on a regular, if not daily, basis. What possible harm can there be in admitting the fee statement? We find two significant problems raised by the admission of the fee statement. First of all, the Federal Rules of Evidence were not complied with. Bankruptcy courts are bound by those rules. Moreover, from a practical standpoint, the admission of the fee statement on the basis of Mr. Johnson's testimony deprived Appellants of any ability to explore the sufficiency of the statement or the nature of the tasks performed. Only the counsel who performed those tasks would be in a position to so testify. The bankruptcy judge's ruling precluded such inquiry, thus creating a real harm to the Appellants.

Had the objection been sustained, the Debtors could have offered additional evidence in order to have the fee statement admitted. We do not believe that it would be appropriate to deprive the Debtors of that opportunity. Accordingly, we vacate the fee award, and remand the case for further proceedings in accordance with this opinion.

V. Conclusion

The appeal of the order denying M & M's motion for relief from the automatic stay is dismissed for lack of jurisdiction. The orders of the bankruptcy court determining that M & M violated the automatic stay, ordering return of the Truck to the Johnsons, and ordering delivery of title to the Truck to the Johnsons without a notation of lien are affirmed. The award of \$937.50 in damages for loss of use of the Truck is reversed. The award of attorney's fees in the amount of

\$5,028.50, and costs in the amount of \$232.23, is vacated, and the case remanded for further proceedings in accordance with the terms set forth herein.