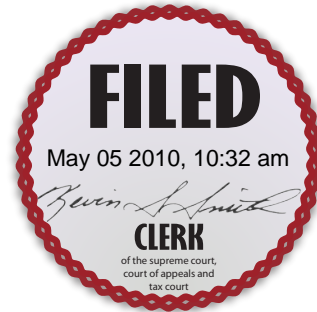


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

MORRIS KELSAY
Marion, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

EDWIN BLINN, JR.,

Appellant-Defendant,

vs.

WILLIAM THORNE,

Appellee-Plaintiff.

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No. 27A02-0911-CV-1073

APPEAL FROM THE GRANT SUPERIOR COURT 3
The Honorable Warren Haas, Judge
Cause No. 27D03-0903-SC-546

May 5, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Edward Blinn, Jr. (Blinn), appeals the trial court's award of damages to Appellee-Plaintiff, William Thorne (Thorne), for breach of warranty.

We reverse and remand.

ISSUE

Blinn presents one issue for our review, which we restate as: Whether the trial court erred when it awarded damages for breach of warranty to Thorne.

FACTS AND PROCEDURAL HISTORY

In October 2008, Thorne's wife noticed an advertisement for a 2000 Dodge Ram 4X4 pickup truck that she thought would be good for her husband. The truck was being sold at Blinn Auto Sales, which was the name under which Blinn operated his business selling automobiles located in Petersburg, Indiana.¹ Thorne's wife called to inquire about the truck and was told that it had been the personal vehicle of the owners of Blinn Auto Sales and that nothing was wrong with it. Thorne went and met with a salesman for Blinn Auto Sales, Joe Quick (Quick), and took the truck on a test drive. Thorne decided that he wanted to purchase the truck and paid the full asking price for the truck.² Thorne signed a document entitled "Used Vehicle Order," which gave the description of the vehicle, the price it was being sold for, and also contained a section of the document marked with an "X": "**SOLD AS IS.**"

¹ There was a lengthy comment by the trial court as to whether Blinn Auto Sales was actually the business of Blinn or his wife. Nevertheless, Blinn has identified himself as the Appellant in this matter and subjected himself to the jurisdiction of the trial court and now this court.

² Thorne also paid sales tax at this time, which he should not have because the truck was sold on consignment from the titled owner Lisa Blinn. There was a dispute before the trial court as to whether Blinn Auto Sales had refunded the sales tax to Thorne. However, that issue is not addressed in this appeal.

(Amended Volume of Exh. p. 3).³ Next to this section, Thorne signed after a statement which reads: “I hereby make this purchase knowingly without any guarantee, expressed or implied, by this dealer or his agent.” (Amended Vol. of Exh. p. 3). On the back of the document are conditions, including condition “3,” which states: “All promises, statements, understandings or agreements of any kind pertaining to this contract not specified herein are hereby expressly waived.” (Amended Vol. of Exh. p. 4). At the bottom of the front of the document it states: “THIS ORDER IS NOT VALID UNLESS SIGNED AND ACCEPTED BY DEALER.” (Amended Vol. of Exh. p. 3). However, no signature is present at the bottom of the document.

In addition, Thorne signed another document titled “BUYERS GUIDE.” (Amended Vol. of Exh. p. 7). Portions of this document are difficult to read; however, a section in large bold print has been marked with an “X” which states “**AS IS-NO WARRANTY[.] YOU WILL PAY ALL COSTS FOR ANY REPAIRS.**” The dealer assumes no responsibility for any repairs regardless of any oral statements about the vehicle.” (Amended Vol. of Exh. p. 7). Near the top of the document is written: “IMPORTANT: Spoken promises are difficult to enforce. Ask the dealer to put all promises in writing. Keep this form.” (Amended Vol. of Exh. p. 7).

Before Thorne got home the truck began “shifting hard.” (Transcript p. 9). Thorne took the truck to a dealership to have it checked. The dealership’s mechanic noticed that the

³ The Amended Volume of Exhibits does not contain page numbers. For citation references we have treated the volume as if it has been assigned numbers sequentially on the front and backs of each document included therein.

transmission was overfull with transmission fluid, and metal shavings were in the fluid. Upon further inspection, the mechanic informed Thorne that the transmission was bad and the cheapest fix would be a complete replacement. The estimated cost for the replacement was \$3,444.04. Thorne repeatedly contacted Quick and after several attempts was able to speak once with Blinn, but neither Blinn nor Blinn Auto Sales paid any amount to remedy the truck's transmission problems.

On March 26, 2009, Thorne filed a small claim lawsuit in Grant County. On April 30, 2009, a trial was held. Thorne testified that Quick induced him to sign the "AS IS" provision by stating that the provision was for "tax reasons and business reasons," and that "if you find anything wrong with the truck let me know." (Tr. p. 9). In addition, Thorne testified that Quick told him when Thorne called complaining of the hard shifting "if you take it to a garage, find out what's wrong with it. We'll work [with] you to get it fixed." (Tr. p. 11). Quick testified that he never told Thorne "[if you] find anything wrong and [] let me know." (Tr. p. 10).

At the close of the evidence, the trial court stated that it found to be credible Thorne's testimony that Quick stated "if anything's wrong let us know and I frankly believe your testimony that he said that they would take care of it." (Tr. pp. 27-28). Further, the trial court stated it was taking into account the fact that the transmission began failing before Thorne got home. The trial court then awarded Thorne \$3,444.04 for the replacement of the truck's transmission, plus other damages related to issues with sales tax and Thorne's difficulty in titling the truck. On May 29, 2009, Blinn filed a motion to correct error alleging

that the trial court's judgment "is inconsistent with both the agreed contract of the parties and the 'Four Corners Doctrine.'" (Appellant's App. p. 12). The trial court denied the motion to correct error, and stated that it concluded that Quick had "specifically advised [Thorne] that the 'AS IS-NO WARRANTY' documents were for form only and Blinn Auto Sales warranted that the truck was in good condition and would correct any problems." (Appellant's App. p. 11).

Blinn now appeals. We will provide additional evidence as necessary.

DISCUSSION AND DECISION

Blinn argues that the trial court erred by failing to enforce the "as is" provision which Thorne agreed to. Judgments from small claims actions are reviewable "as prescribed by Indiana rules and statutes." Ind. Small Claims Rule 11(A). When reviewing claims tried by any court without a jury, we cannot set aside the judgment unless it is clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. Ind. Trial Rule 52(A). In determining whether a judgment is clearly erroneous, we do not reweigh the evidence or determine the credibility of the witnesses, but consider only the evidence which supports the judgment and reasonable inferences drawn therefrom. *Counciller v. Ecenbarger*, 834 N.E.2d 1018, 1021 (Ind. Ct. App. 2005). A judgment in favor of a party carrying the burden of proof will be affirmed if a reasonable trier of fact could conclude that the elements of the party's claim has been proved by a preponderance of the evidence. *Id.* This deferential standard of review is particularly applicable when reviewing

small claims actions where trials are informal with the sole objection of administering speedy justice consistent with the substantive law. Ind. Small Claims R. 8(A).

We also note that Thorne has not filed an Appellee's Brief. Where an Appellee fails to file a brief, we may, in our discretion, reverse the trial court if the Appellant makes a *prima facie* showing of reversible error. *Johnston v. Johnston*, 825 N.E.2d 958, 962 (Ind. Ct. App. 2005). In this context, *prima facie* is defined as "at first site, on first appearance, or on the face of it." *Orlich v. Orlich*, 859 N.E.2d 871, 873 (Ind. Ct. App. 2006). This rule was established for our protection so we can be relieved of the burden of refuting the arguments advanced in support of reversal where that burden properly rests with the Appellee. *Johnston*, 825 N.E.2d at 962.

Indiana Code section 26-1-2-316(3)(a) provides that "unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like 'as is', 'with all faults', or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty." It is well-settled that automobile dealers may use this law to exclude express warranties and make it plain that there is no implied warranties. *Town and Country Ford, Inc. v. Busch*, 709 N.E.2d 1030, 1032 (Ind. Ct. App. 1999). Here, where Thorne has signed two separate documents expressly stating that the sale was "as is," one of which expressly states that the "dealer assumes no responsibility for any repairs regardless of any oral statements about the vehicle." (Amended Vol. of Exhibits p. 7). Although the validity of the "Used Vehicle Order" may be questionable due to the absence of the dealer's signature at the bottom, Thorne never

questioned the validity of that document before the trial court despite repeated reference to that document. He has not filed an Appellee's Brief to advance such an argument now. For these reasons, we conclude that Blinn has demonstrated *prima facie* error in the trial court's judgment. Therefore, we reverse and remand for the trial court to remove compensation for the faulty transmission from the calculation of damages.

CONCLUSION

Based on the foregoing, we conclude that the trial court erred when it awarded damages to Thorne in contravention of his agreement that the truck he purchased was being sold "as is."

Reversed and remanded.

MATHIAS, J., and BRADFORD, J., concur.