RENDERED: AUGUST 24, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-003087-MR

DAVID THOMAS d/b/a/ DAVID THOMAS TRUCKING — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 96-CI-007356

MACK TRUCKS, INC. and KENTUCKIANA MACK SALES, INC. — APPELLEES

and

NO. 2000-CA-000037-MR

MACK TRUCKS, INC. — CROSS-APPELLANT

v.

CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 96-CI-007356

DAVID THOMAS d/b/a DAVID THOMAS TRUCKING and KENTUCKIANA MACK SALES, INC. — CROSS-APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING
ON APPEAL AND ON CROSS APPEAL
** ** ** ** **

BEFORE: BUCKINGHAM, COMBS, and SCHRODER, Judges.

COMBS, JUDGE: David Thomas, d/b/a David Thomas Trucking, appeals from a judgment of the Jefferson Circuit Court. On post-judgment motions, the court reduced the amount of damages awarded to Thomas by the jury in his lawsuit against Mack Trucks, Inc., (Mack), for breach of warranty. In addition to challenging the *remittitur* of the jury's verdict, Thomas alleges error in the trial court's denial of his requests for pre-judgment interest and certain lost profits — as well as its summary dismissal of his tort claim.

Mack cross-appeals, alleging that Thomas presented insufficient evidence to establish damages or to prove that its trucks were defective in the first instance. Mack also argues that the trial court erred: (1) in refusing to allow it to present a defense of illegality and (2) in determining unconscionability in the terms of the warranty excluding its liability for consequential damages. After a review of the record, we affirm the trial court's rulings in part and reverse in part and remand.

The controversy arose as a result of Thomas's purchase of two new tri-axle dump trucks in the summer of 1995 for use in his business of hauling sand and gravel. The trucks were purchased from the appellee, Kentuckiana Mack Sales, Inc., (KMS); they were manufactured by Mack. Mack warranted the trucks for 3 years/300,000 miles; Thomas paid an additional $4,000 for an extended warranty covering the trucks for 5 years/500,000 miles. Under the terms of the warranty, Mack was obligated to repair or to replace any defective parts.

During the first year of operation, Thomas began experiencing repeated instances of blown rear tires and melted valve stems caused by the overheating of the brakes. Between May and September 1996, Thomas replaced numerous tires and valve stems on the trucks. He took the trucks to KMS, whose service department made repeated attempts to ascertain the cause of the overheating. When KMS was unable to find any mechanical problem with the brakes, it sought help from Mack's representatives. Mack's specialists conducted some testing and rode with Thomas's drivers, but they also were unable to identify the problem or to make appropriate repairs. Most of the parts within the braking system were replaced by Bill Smith, Mack's brake specialist, but the problems persisted.

In September 1996, after several months of futile attempts to repair the two trucks, Thomas parked them and did not drive them again. He purchased two new Ford trucks. He ceased making monthly payments on the Mack trucks after six months; they were repossessed and sold for $80,000 at auction to buyers who were unaware of their defective condition.

Thomas then hired an attorney, and in October 1996, Mack informed him that it would not make further efforts to repair or to replace the trucks. For the first time, Mack advised Thomas that it believed that the brakes were overheating because of the manner in which he had operated the trucks — specifically that he was "grossly" overloading the trucks with the materials that he was hauling. In December 1996, Thomas filed his complaint against Mack and KMS for breach of warranty;

Mack filed a cross-claim for indemnity against KMS; and the case was tried in August 1999. In answers to interrogatories, Thomas informed Mack that he intended to seek $500,000 for damages attributable to his mental anguish and pain and suffering; he sought an equal amount in punitive damages. Early in the trial, after stating that it had not seen anything in the record to suggest the existence of any claim other than one for breach of warranty, the court ruled that Thomas could not seek tort-type damages for Mack's alleged bad faith in failing to honor its warranty to repair the trucks.

All claims against KMS were dismissed on its motion for directed verdict. However, the trial court denied Mack's motions for a directed verdict. It instructed the jury that if it found that Mack had failed to repair or to replace the defects in Thomas's trucks after having been given an opportunity to do so, it could award up to $135,662 for the loss of value of the trucks, $10,282 in loss of profits, and $7,100 for repair expenses (new tires and valve stems). The jury awarded all the damages sought for lost profits and repair expenses as well as $108,800 for loss of value of the trucks. The trial court denied Thomas's request for pre-judgment interest and entered a judgment in the amount of $126,182 on October 1, 1999.

Both parties filed post-judgment motions. Thomas asked the trial court to reconsider its refusal to award pre-judgment interest; Mack moved for a judgment notwithstanding the verdict (JNOV) or, in the alternative, for a new trial based on its contention that the proof was insufficient to establish that its

trucks were defective. Although it denied the motions, the trial court *sua sponte* reduced the jury's award by $80,000, the amount for which the trucks were sold at auction. This appeal and cross-appeal followed.

We begin our review with Mack's arguments on cross-appeal. Mack contends that the trial court erred in denying its motions for a directed verdict and for a JNOV, both of which were based on their allegation that Thomas failed to produce sufficient evidence to establish a defect in the trucks. Our standard of review directs that we must accept all evidence which favors the prevailing party as true, and we may not "determine credibility or the weight which should be given the evidence." Lewis v. Bledsoe Mining Co., Ky., 798 S.W.2d 459, 461 (1990).

While Mack is correct in stating that Thomas did not offer evidence of the exact nature or cause of the defect, he did present considerable evidence that something was seriously wrong with the trucks; that is, that the brakes continuously overheated to such an extreme extent that they caused the tires to fail. Cox Motor Car Company v. Castle, Ky., 402 S.W.2d 429, 431 (1966). In Smith v. General Motors Corp. Ky.App., 979 S.W.2d 127, 132 (1998), this Court held that "[a] defect may be proved by a sufficient quantum of circumstantial evidence." Mack offered expert testimony to support its defense that Thomas so misused or overloaded the trucks that he caused the problem. However, that testimony did not comply with the precedent in Castle and Smith, supra, as to the quantity of proof necessary to establish a defect. Having reviewed the record, we determine that sufficient

evidence was presented by Thomas to overcome and withstand Mack's motions for directed verdict and JNOV.

Mack next argues that the trial court erred in its instruction allowing the jury to award Thomas the difference in the market value of the vehicles with and without the defect. Mack's argument in this regard is dual in nature. First, it asserts that Thomas failed to disclose the amount of these damages in his answers to interrogatories; second, it contends that Thomas failed to offer sufficient proof to establish the difference in the market value of the trucks.

Because the trucks were relatively new, Thomas believed that he was entitled to rescind the contract. In answers to its interrogatories, Thomas informed Mack that he intended to seek recission of the contract and damages in the amount of $197,000 -- the purchase price of the two vehicles. Ultimately, the trial court refused to allow Thomas to recover the sums paid for the trucks but allowed the jury to award him the loss in value attributable to the defect — a sum considerably less than $197,000. Contrary to Mack's contention, Thomas's answer was sufficient to satisfy Kentucky Rules of Civil Procedure (CR) 8.01(2), which provides in pertinent part:

> When a claim is made against a party for unliquidated damages, that party may obtain information as to the amount claimed by interrogatories; if this is done, the amount claimed shall not exceed the last amount stated in answer to interrogatories.

This rule was designed to put parties on notice of unliquidated sums to be sought at trial. We believe that Thomas complied adequately with it. Mack argues that the circumstances "cannot

be distinguished" from those in Fratzke v. Murphy, Ky., 12 S.W.3d 269 (1999), in which the plaintiff failed to list any amount for unliquidated damages. We disagree. Mack was indeed on notice of the amount of damages which Thomas hoped to recover for the breach of warranty. Thomas actually recovered less than that amount at trial — a fact that further vitiates Mack's allegation of surprise.

We believe that the testimony was sufficient for the jury to determine the value of the trucks both with and without the defects. Thomas and Jim Fruits, the owner of KMS, both testified that the value of the trucks without properly working brakes was $0. Fruits also provided testimony from which the fair market value of the vehicles could be determined had they not been defective. From this testimony, the trial court instructed the jury that it could award Thomas the difference between the fair market value of the trucks "as they should have been and the fair market value as they were" — not to exceed $136,662. Again, we find the evidence sufficient both to overcome Mack's motions for directed verdict and to support the jury's verdict awarding Thomas $108,800 for the loss of value of the trucks.

Mack next contends that the trial court erred in excluding the testimony of Steve Maffett, an employee of the Kentucky Department of Transportation. The trucks which Thomas purchased were designed to carry weights in excess of 80,000 pounds, and they were marketed as being capable of performing at those weights. Through Maffett's testimony, Mack endeavored to

prove that Thomas hauled weights in excess of 68,000 pounds, the weight limit prescribed by Kentucky Revised Statutes (KRS) 189.222(7)(b). The trial court correctly concluded that the fact that Thomas hauled loads in excess of weight limits created by the Legislature was not relevant to the issue of Mack's duties under its warranty to repair or replace defects in the trucks. We find no error.

Mack's final argument concerns the trial court's ruling that allowed Thomas to recover $10,282 for profits lost while the trucks were in the shop from May through September 1996, the period during which KMS and Mack were attempting to repair the defective brakes under the terms of the warranty. In denying Mack's post-judgment motion with respect to this issue, the trial court determined that it would be unconscionable to apply the provisions of the warranty limiting Mack's liability for consequential damages. In so ruling, the court made no analysis of the "circumstances existing at the time of the making of the contract" (emphasis added) as required by KRS 355.2-302. Rather, it concluded in retrospect that the contract was unconscionable after the jury found that the warranty's remedy had failed of its essential purpose.

The court rejected Mack's argument seeking to enforce the terms limiting its liability. Without citing any authority, the court apparently relied on Ford Motor Company v. Mayes, Ky.App., 575 S.W.2d 480, 485-86 (1978), which holds:

> After breach of its duty under the express warranty to repair or replace defective parts within a reasonable time, Ford could not, in good conscience, attempt to hide behind any

> provision making the express warranty the sole remedy of the buyer.
>
> . . .
>
> Once Mr. and Mrs. Mayes proved that the purpose of the limited remedy had failed within the meaning of KRS 355.2-719(2), there is a question whether they have also automatically shown that the exclusion of consequential damages was "unconscionable" under KRS 355.2-719(3). Most important, the Consumer Protection Act expresses a legislative intent to protect the consumer public. KRS 367.120(1). Public policy dictates that Ford not be permitted to limit the statutory remedy of consumers to recover "actual damages" . . . .

Mack seeks to distinguish Mayes because it was litigated pursuant to the Kentucky Consumer Protection Act, which provides for an unwitting consumer's recovery of actual damages as distinguished from a commercial transaction involving savvy businessmen dealing at arm's length. Mack relies on Gooch v. E.I. duPont deNemours & Company, 40 F.Supp.2d 863 (W.D.Ky 1999), which upheld a clause limiting the manufacturer's liability for consequential damages even though its warranty failed of its essential purpose. In discussing the relationship between two pertinent provisions of Kentucky's version of the Uniform Commercial Code, the Court stated that:

> if an exclusive or limited remedy "fails of its essential purpose," then the party may seek any remedy available under the U.C.C., which includes consequential damages. KRS 355.2-719(2). Furthermore, contracting parties may limit or exclude consequential damages in their agreement unless this would prove unconscionable. KRS 355.2-719(3).

The Gooch court observed that no reported case in Kentucky had specifically addressed the conscionability of a

clause limiting liability for consequential damages in a commercial transaction. Relying on an unreported case from this court and cases from other jurisdictions, the Gooch court concluded that the limitation at issue was not unconscionable.

The circumstances involving Thomas and Mack are quite similar to those in Gooch, and we believe that that court's reasoning is controlling in this case. Thomas's agreement with Mack "arose out of a commercial transaction between sophisticated parties"; the agreement was "not unduly one-sided"; Thomas used the product "for an extended period of time"; Thomas was not "left without a remedy"; and Thomas

> failed to satisfy [his] burden to show the clause resulted from the parties [sic] unfair bargaining positions and that the inclusion of such a clause constituted unfair surprise.

Id., at 871-872. There are no facts to support the trial court's determination that the exclusionary clause in the contract was unconscionable pursuant to KRS 355.2-719. Nor was there any finding that circumstances existing contemporaneously at the time of the making of the contract revealed elements of unconscionability. KRS 355.2-302. Therefore, we reverse the judgment to the extent that it awards consequential damages.

We shall next address Thomas's arguments on direct appeal. Thomas contends that the trial court erred in remitting the jury's award of damages. We agree. Although Mack did not ask the trial court to alter or amend the judgment, the trial court *sua sponte* reduced the award by $80,000, the amount for which the trucks were sold at auction. At trial, the court accepted Mack's argument that the amount paid for the trucks at

auction was not relevant to the amount of damages suffered by Thomas. The trial court limited Thomas's damages to the loss in value attributable to the defects in the trucks, a value which would not be affected by the amount that Thomas might have been able to obtain for the trucks regardless of the manner in which they were sold. We believe that this post-trial *remittitur* was inconsistent with the previous rulings at trial and that the trial court had no basis for its reduction of the jury's verdict. Hanson v. American National Bank & Trust Co., Ky., 844 S.W.2d 408 (1992). If the trial court erred in instructing the jury as to the proper amount of damages that could be awarded, it could correct such an error only by setting aside the verdict and ordering a new trial. Id.; see also, CR 59.01. Its *sua sponte remittitur* was erroneous as a matter of law.

Thomas also contends that he was entitled to an award of pre-judgment interest as a matter of law because Mack breached its contractual duties. Alternatively, Thomas argues that even if his damages were unliquidated, equity demands that he be awarded pre-judgment interest.

In Kentucky, pre-judgment interest is due "as a matter of course" where damages are liquidated; that is, "made certain or fixed by agreement of parties or by operation of law" at the time the complaint is filed. Nucor Corp. V. General Electric Co., Ky., 812 S.W.2d 136, 141, 144 (1991), citing Restatement (Second) of Contracts § 354. Where damages are not liquidated, the decision whether to award pre-judgment interest is committed to the sound discretion of the trial court. Murray v. McCoy,

Ky., 949 S.W.2d 613, 615 (1996). In light of the instruction that the jury could award damages in an amount "not to exceed" $136,662, we conclude that Thomas's damages were not liquidated.

Regardless of whether the damages were liquidated or unliquidated, a court must evaluate the issue in terms of whether

> justice and equity demand an allowance of interest to the injured party. . . . Where under a contract a debt is due at a certain time, both reason and authority say that it carries interest from that time.

Dalton v. Mullins, Ky., 293 S.W.2d 470, 477 (1956). In denying Thomas pre-judgment interest, the trial court reasoned that Thomas had not "apparently suffered any loss due to the financing of the original purchase of the trucks" and that the finance company did not intend to pursue him for any deficiency. The trial court also noted that Thomas was able to recoup his incidental and consequential damages.

The record does not support either finding with respect to Thomas's losses due to financing of the trucks or a waiver by the finance company of its claim to remaining amounts owed by Thomas. Additionally, we have concluded earlier that the trial court erred in allowing Thomas to recover consequential damages. However, despite these errors in reasoning, we cannot say that the court was clearly erroneous in denying an award of pre-judgment interest. Several other factors weigh heavily against such an award: (1) the damages were not readily ascertainable; (2) Thomas's complaint and amended complaint did not contain a prayer for pre-judgment interest; and (3) Thomas failed to identify any delay in the trial attributable to Mack. Any

inconsistencies in reasoning do not rise to the level of reversible error, and we do not believe that the trial court abused its considerable discretion on this issue. See Nucor, at 144.

Next, Thomas argues that the trial court erred in refusing to allow him to recover profits lost from September 1996 through August 1997 -- the period during which the trucks were still in his possession after Mack had disclaimed any obligation to make further repairs. We have held that the trial court erred in allowing Thomas to recover any consequential damages. That ruling disposes of Thomas's argument that he was entitled to recover additional lost profits. We hold that he was not entitled to do so.

Thomas next argues that the trial court erred in summarily dismissing his bad faith claim against Mack and in refusing to give the jury a punitive damages instruction. Thomas analogizes Mack's warranty to repair or to replace to an insurance contract, arguing that Mack "has the same fiduciary obligation" to him as an insurer has to its insured. Despite the compelling philosophical appeal of that argument, our Supreme Court has recently defined the scope of such a tort claim rather narrowly:

> the UCSPA [Unfair Claims Settlement Practices Act] and the tort of "bad faith" apply only to those persons or entities (and their agents) who are "engaged . . . in the business of entering into contracts of insurance."

Davidson v. American Freightways, Inc., Ky., 25 S.W.3d 94, 102 (2000). Mack is not engaged in the business of insurance and is

not thus liable in tort for a claim of bad faith in failing to perform as obligated under its contract. Id.

Finally, Thomas complains that the trial court erred in failing to give the jury the opportunity to award punitive damages and in restraining him from introducing evidence that Mack's breach of contract involved fraud, oppression, or malice as a predicate for such an instruction. We have been unable to locate where the issue of punitive damages was preserved for review. The instructions tendered by Thomas did not contain an instruction on punitive damages — nor did Thomas specifically object to the trial court's final instructions for failure to include an instruction for punitive damages.

Nonetheless, despite the preservation problem, our review of the trial reveals no error. Punitive damages "are not recoverable for a mere breach of contract." Faulkner Drilling Company, Inc. v. Gross, Ky.App., 943 S.W.2d 634, 638 (1997). It is only when separate tortious conduct accompanies the breach that punitive damages may be awarded. Id., citing Wittmer v. Jones, Ky., 864 S.W.2d 885 (1993), and Ford Motor Co. v. Mayes, supra. Although the trial court did not accept Thomas's theory that Mack's breach could be characterized as the tort of bad faith, it did not exclude any evidence relating to Mack's behavior in its dealings with Thomas. It excluded only the evidence of the financial hardship on Thomas caused by Mack's breach of warranty as well as the mental and emotional suffering resulting from the frustration of the whole transaction. While Thomas suggested that Mack's behavior "could well rise to the

level of fraud," he did not present this theory to the trial court. The evidence was sufficient to establish that it was unreasonable for Mack to blame Thomas for the trucks' defects. However, such unreasonableness did not amount to fraudulent conduct on the part of Mack.

That portion of the judgment of the Jefferson Circuit Court awarding Thomas lost profits is reversed. The judgment remitting the jury's award for loss of value is reversed, and the court is instructed on remand to enter a judgment for loss of value in conformity with the jury's verdict. The judgment is affirmed in all other respects.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-APPELLEE DAVID THOMAS:

Kirk Hoskins
Louisville, KY

BRIEF FOR APPELLEE/CROSS-APPELLANT MACK TRUCKS, INC.:

Mark L. Moseley
Lexington, KY

BRIEF FOR APPELLEE KENTUCKIANA MACK SALES, INC.:

Guy E. Hughes
R. David Clark
Lexington, KY