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Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002623-MR

NISSAN MOTOR ACCEPTANCE CORPORATION — APPELLANT

v.

APPEAL FROM TRIMBLE CIRCUIT COURT
HONORABLE DENNIS A. FRITZ, JUDGE
ACTION NO. 96-CI-00054

DALE L. HAWKINS — APPELLEE

OPINION
AFFIRMING IN PART AND REVERSING IN PART

** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; EMBERTON, AND McANULTY, JUDGES.

McANULTY, JUDGE. Nissan Motor Acceptance Corporation (NMAC) appeals from a jury verdict in favor of appellee Dale L. Hawkins (Hawkins). The jury verdict rejected NMAC's breach of contract claim for damages arising out of the purported lease of a 1996 Nissan Maxima, and awarded damages to Hawkins in his counterclaim against NMAC under the Kentucky Consumer Protection Act (KRS 367.110 et. seq.) based upon the acts and conduct of NMAC in conjunction with its efforts to enforce and collect upon the purported lease.

This is an appeal from a judgment entered upon a jury verdict, and, consequently, in our review of the facts, all

evidence which favors Hawkins is taken as true, and, further, Hawkins is given the benefit of all reasonable inferences which may be drawn from the evidence. Smith v. Wal-Mart Stores, Inc., Ky., 6 S.W.3d 829, 830 (1999). Pursuant to this standard, the facts are as follows.

On February 6, 1996, Hawkins took his Nissan pickup truck to Freedom Nissan in Madison, Indiana, for repair work. While waiting for the truck repairs, a Freedom Nissan salesman, Earl Pruitt, approached Hawkins and attempted to interest him in purchasing a showroom quality gold 1996 Nissan Maxima SE with .2 miles on the odometer, no dents, floormats, and a new car smell. After test driving the car, Hawkins signed a blank form and put down a $100.00 deposit for Freedom Nissan to hold the car. That night, Pruitt called Hawkins at home and attempted to interest Hawkins in leasing, rather than purchasing, the vehicle.

The next day, February 7, Hawkins returned to Freedom Nissan. Hawkins was met by a Freedom employee who took possession of Hawkins' pickup truck. The employee told Hawkins that his Nissan Maxima was ready at the front door, that they had previously filled out the wrong paperwork, and that new paperwork needed to be filled out on the car. Hawkins met with Freedom finance manager Ron Lewis and was again induced into signing blank forms. Following that, Hawkins inspected the Nissan he had supposedly leased and discovered that unlike the one he had test driven the day before, this Maxima had 200 miles on the odometer, was dented, had no floor mats, and reeked of cigar smoke. Recognizing the switch, Hawkins objected and a dispute occurred.

Lewis then told Hawkins that he had "no choice" and that the car was "his baby." As Freedom had taken possession of his pickup truck, Hawkins left with the Nissan Maxima.

Prior to leaving, Hawkins was given a copy of the lease contract. Upon comparison of Hawkins' copy of the lease with the copy Freedom Nissan eventually sent to NMAC upon its assignment of the lease to NMAC, it is evident that Freedom Nissan made alterations to the lease documents, crossed out entries, made new entries, and forged Hawkins' initials alongside the changes. The changes were of sufficient substance and quality as to have put NMAC on notice that the documents had been materially altered, thereby vitiating any claim by NMAC to holder in due course status.

The next day, February 8, Hawkins contacted an attorney, who advised him to return the car to Freedom Nissan and park it. Upon returning to Freedom Nissan, however, Hawkins discovered that Freedom had ceased operations, all vehicles, inventory and salespersons were gone, and his own pickup truck was nowhere to be found. Also about this time, Hawkins looked in the glovebox of the Nissan and found documents showing the vehicle as being listed to Superior Nissan of Nicholasville, Kentucky. Hawkins also found in the glovebox a toll-free number for Nissan Motor Acceptance Corporation, and on February 9, two days after taking delivery of the vehicle, he made the first of many calls to the company.

During the February 9 phone call, Hawkins notified NMAC of the facts surrounding the purported lease of the Maxima,

including that Freedom Nissan had switched vehicles on him, that he had attempted to refuse acceptance of the vehicle, and that he had accepted the vehicle only because Freedom Nissan had left him no alternative. Hawkins further informed Nissan that there was no deal for him to lease the vehicle, that he did not intend to honor the lease, that he was going to park the car, and that NMAC could pick it up at their convenience.

In the subsequent weeks, Hawkins continued to call and complain to NMAC, telling the company's representatives that the car was parked on his carport and for them to come and pick it up. NMAC, however, was unsympathetic to Hawkins' problems, did not accept his claim that there was no lease agreement, did not accept his invitation to pick up the vehicle, and eventually turned him in to three credit bureaus for defaulting upon the lease agreement, resulting in serious damage to Hawkins' credit rating.

On June 25, 1996, NMAC filed a Complaint in Trimble Circuit Court falsely stating that Hawkins was detaining the Maxima in contravention of NMAC's interest and seeking possession of the vehicle. The suit sought a personal judgment on the lease agreement of $28,850.43, and a personal judgment for attorney fees and costs related to the litigation. On July 6, 1999, a writ of possession for the Maxima was issued by the trial court, and the vehicle was subsequently repossessed. NMAC thereafter sold the vehicle, applied the proceeds as a credit to Hawkins' account, and eventually amended its complaint to reflect a demand for $9,330.11.

On July 27, 1996, Hawkins filed his answer to NMAC's complaint and denied liability under the claims. Hawkins also filed a counterclaim against NMAC alleging entitlement to damages under the Kentucky Consumer Protection Act.

On June 16, 1999, the matter was tried before a jury. On NMAC's breach of contract claim against Hawkins, the jury returned a verdict in favor of Hawkins and awarded NMAC no monies. On Hawkins' counterclaim under the Consumer Protection Act, the jury returned a verdict in favor of Hawkins and awarded him damages of (1) $2,945.00 in compensatory damages representing the difference in the retail value and the trade in value of his 1995 Nissan pickup truck; (2) $100.00 in compensatory damages representing the deposit he had paid on February 6, 1996, to hold the showroom Maxima; (3) $75.00 in compensatory damages representing monies expended for insurance on the delivered Maxima; and (4) $20,000.00 in punitive damages. In addition, the verdict form included the handwritten statement, "We the jury require NMAC to restore Mr. Dale Hawkins' credit record to good standing." Judgment pursuant to the jury verdict was thereafter entered, at which time the trial court additionally awarded Hawkins $4,284.00 in statutory attorney fees. KRS 367.220(3). On July 29, 1999, NMAC filed a motion for a new trial, which was denied by order dated October 11, 1999. This appeal followed.

Upon review of the evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. All evidence which

favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. Kentucky & Indiana Terminal R. Co. v. Cantrell, 298 Ky. 743, 184 S.W.2d 111 (1944), and Cochran v. Downing, Ky., 247 S.W.2d 228 (1952). The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is "'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'" NCAA v. Hornung, Ky., 754 S.W.2d 855, 860 (1988). If the reviewing court concludes that such is the case, it is at liberty to reverse the judgment on the grounds that the trial court erred in failing to sustain the motion for directed verdict. Otherwise, the judgment must be affirmed. Lewis v. Bledsoe Surface Min. Co., Ky., 798 S.W.2d 459, 461-462 (1990).

First, NMAC contends that it did not violate the Consumer Protection Act. Specifically, NMAC alleges that (1) the elements of a Consumer Protection Act violation were not proved, and (2) the only actual damages incurred by Hawkins were caused by Freedom Nissan, not by NMAC.

Throughout the trial proceedings NMAC has maintained that the Consumer Protection Act was inapplicable to this situation because any prohibited practices under the Act were committed by Freedom Nissan and not by NMAC. Hawkins has stated

in rebuttal that his claim against NMAC was not based upon Freedom Nissan's conduct, but, rather, was based upon NMAC's acts and practices in its efforts to collect upon a lease that it knew, or should have known, was bogus and fraudulent. Among the unfair practices that Hawkins alleges NMAC engaged in are (1) filing suit against him to enforce an unenforceable lease; (2) damaging his credit by reporting him for being in default on what NMAC knew to be an unenforceable lease; (3) filing a false affidavit in court stating that he was detaining the vehicle when, in fact, Hawkins had stated to NMAC that it could pick up the vehicle; and (4) following the sale of the repossessed Maxima, filing a motion for summary judgment for an amount that did not give him credit for the proceeds of the sale of the vehicle.

KRS 367.220(1) provides the basic framework for a lawsuit under the Consumer Protection Act. The statute authorizes a lawsuit for the recovery of money or property in the case of a lease as follows:

> Any person who . . . leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by KRS 367.170, may bring an action . . . to recover actual damages. The court may, in its discretion, award actual damages and may provide such equitable relief as it deems necessary or proper. Nothing in this subsection shall be construed to limit a person's right to seek punitive damages where appropriate.

Unlawful acts are defined in the Act as "[u]nfair, false, misleading, or deceptive acts or practices in the conduct

of any trade or commerce[.]" KRS 367.170(1). The term "unfair" means unconscionable. KRS 367.170(2). KRS 367.110(2) defines "trade" and "commerce" as "the advertising, offering for sale, or distribution of any services and any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value, and shall include any trade or commerce directly or indirectly affecting the people of this Commonwealth." (Emphasis added.)

Based upon the foregoing sections of the Consumer Protection Act, the elements which Hawkins was required to prove to maintain a suit against NMAC under the Consumer Protection Act were as follows:

> (1) That Hawkins leased a vehicle for personal, family or household purposes;
>
> (2) That NMAC was engaged in trade or commerce with respect to Hawkins' lease of the vehicle;
>
> (3) That NMAC engaged in unfair/ unconscionable, false, misleading, or deceptive acts or practices in conjunction with Hawkins' lease of the vehicle; and
>
> (4) That as a result of NMAC's unfair/ unconscionable, false, misleading, or deceptive acts or practices, Hawkins suffered an ascertainable loss of money or property.

With respect to the first element, it is, of course, undisputed that Hawkins leased, albeit under allegedly fraudulent circumstances, a 1996 Nissan Maxima. With respect to element (2), we are persuaded that NMAC engaged in trade or commerce in that, in the terminology of KRS 367.110(2), NMAC "distribut[ed] . . . [a] service . . . directly or indirectly affecting the people of this Commonwealth." Specifically, NMAC distributed the

service of servicing an automobile lease contract which directly affected Hawkins. Contrary to NMAC's position, assignees of automobile lease contracts who thereafter service those leases to citizens of the Commonwealth engage in "trade and commerce" within the meaning of the Consumer Protection Act.

Element (3) was a factual issue for the jury. The jury determined that NMAC engaged in unfair, i.e., unconscionable, false, misleading, or deceptive acts or practices in conjunction with its attempts to enforce the lease. The terms "false, misleading and deceptive" has sufficient meaning to be understood by a reasonably prudent person of common intelligence. Dare to be Great, Inc. v. Commonwealth, ex rel. Hancock, Ky., 511 S.W.2d 224 (1974). Therefore, when the evidence creates an issue of fact regarding whether any particular action is unfair, false, misleading or deceptive, it is to be decided by a jury. Stevens v. Motorists Mut. Ins. Co., Ky., 759 S.W.2d 819, 820 (1988). In this case, the issue was referred to the jury in Instruction No. 2, and the jury decided this issue adversely to NMAC. The jury's decision was not so palpably or flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice, and must accordingly be upheld. NCAA v. Hornung, supra.

With respect to element (4), we are persuaded that two components of the compensatory damages award must be reversed. The jury awarded Hawkins compensatory damages of (1) $2,945.00, which represents the difference in the retail value and trade-in value of his trade-in 1995 Nissan pickup truck; (2) $100.00,

which represented a $100.00 deposit paid to Freedom Nissan; and (3) $75.00 in insurance costs Hawkins purchased for the Nissan Maxima, which represents additional insurance costs in excess of his insurance costs on the trade-in Nissan pickup.

KRS 367.220(1) provides for the recovery of damages for "any ascertainable loss of money or property, real or personal, as a result of the use or employment of another person of [methods or practices which are]" read in conjunction with KRS 367.170(1), "unfair, false, misleading, or deceptive[.]" (Emphasis added). In summary, any monies recoverable by Hawkins must be losses incurred "as a result of" NMAC's improper debt collection practices and, conversely, Hawkins may not recover for losses solely caused by the unfair acts and practices of Freedom Nissan.

We are unable to identify a nexus between the $2,945.00 in damages awarded in conjunction with Hawkins' loss of his trade-in vehicle and any unfair acts committed by NMAC following its acceptance of the assignment of the lease. We have a similar difficulty with the award for the $100.00 deposit Hawkins paid to Freedom Nissan in conjunction with the anticipated purchase of the showroom Nissan Maxima. These losses appear to be exclusively associated with the improper acts of Freedom Nissan.

For purposes of reviewing the damages associated with the trade-in vehicle and the deposit, it is beneficial to return to the date of February 9, 1996, the day that Hawkins first communicated with Nissan regarding the problem with the lease. If, on that day, NMAC had acknowledged the invalidity of the

lease, it would appear that all it was in a position to do, and all that it would have been obligated to do, was to acknowledge the rescission of the lease, retrieve the Maxima, and make no further demands upon Hawkins with respect to the lease. We fail to comprehend the theory under which NMAC would be responsible for any losses associated with Freedom Nissan's absconding with Hawkins' trade-in pickup truck. That conversion was committed exclusively by Freedom Nissan, and was not related to the unfair collection practices engaged in by NMAC on and after February 9, 1996. Hawkins is not entitled to collect damages from NMAC relating to his loss of the pickup truck, and we accordingly reverse the jury verdict insofar as it awarded damages for this loss.

Similarly, there is no nexus between Hawkins' loss of his $100.00 deposit and NMAC's unfair collection practices. The $100.00 deposit was remitted to Freedom Nissan on February 6, 1996, to hold the showroom Maxima in anticipation of a purchase. Ultimately, apparently due to Freedom's deception, the purchase agreement was never consummated, and, instead, Hawkins was deceived into entering into a fraudulent lease which was eventually assigned to NMAC. As the $100.00 loss was unrelated to any unfair acts engaged in by NMAC in conjunction with its unfair practices in attempting to enforce the lease, the award for the $100.00 deposit must be reversed.

There is a sufficient nexus between the $75.00 award for insurance costs and the acts of NMAC to sustain that award. The $75.00 award represents the additional insurance Hawkins was

required to pay over and above the insurance premiums on his pickup truck. Had NMAC timely complied with Hawkins' request that it retrieve the Maxima, conceded that the lease was obtained by fraud, and ceased all collection efforts on the lease, it appears that the additional insurance expense would have been avoided.

Next, NMAC contends that permitting a consumer to bring a counterclaim against an assignee of a debt would result in an unnecessary and unwarranted expansion of the Consumer Protection Act because Kentucky law already provides a remedy for the wrongful conduct alleged in this case. Specifically, NMAC contends that in lieu of filing a counterclaim under the Consumer Protection Act, Hawkins could have (1) filed a motion for summary judgment and then sought sanctions under Civil Rule 11, or (2) obtained dismissal of the case and then filed a malicious prosecution action. We disagree.

The availability of alternative litigation strategies and theories is not a basis for barring a lawsuit under the Consumer Protection Act. In fact, had he chosen to, in addition to his Consumer Protection Act claim, Hawkins may have also decided to pursue the theories suggested by NMAC. In his pleadings, a plaintiff may assert alternative, or even inconsistent, theories of recovery. CR 8.05(2); Smith v. Isaacs, Ky., 777 S.W.2d 912, 915 (1989).

Next, NMAC contends that if the Consumer Protection Act does apply in this case, then the section of the act which should apply is KRS 367.610, the specific section addressing assignee

liability, rather than the general sections relied upon by Hawkins. We disagree.

KRS 367.610 provides, in relevant part, as follows:

> With respect to any consumer credit contract taken in connection with any . . . lease of goods or services . . . an assignee of the rights of the . . . lessor is subject to all defenses of the buyer against the . . . lessor arising out of the . . . lease notwithstanding an agreement to the contrary, but the assignee's liability under this section may not exceed the amount owing to the assignee at the time the defense is asserted against the assignee. Rights of the . . . lessee under this section can only be asserted as a matter of defense to or set off against a claim by the assignee.

KRS 367.610 specifically addresses the assignment of a consumer credit contract and provides the consumer with defenses in a lawsuit brought by the assignee of the contract against the consumer based upon acts which the assignor of the contract committed irrespective of whether the assignee is a holder in due course. Nothing in the language of the statute, however, precludes a consumer from using other provisions of the Act to offensively bring a lawsuit as a plaintiff against the assignee for acts which the assignee alone committed.

In this case, KRS 367.610, independent of the holder in due course rules, would permit Hawkins to assert his defenses with respect to Freedom Nissan against NMAC.[1] However, the limiting language of the statute, i.e., the reference to "the assignee's liability under this section," does not preclude

[1]For some reason Hawkins did not raise this issue in his pleadings or at trial, and the jury instructions did not reflect the existence of this statute.

Hawkins from suing under the general provisions of the Consumer Protection Act for violations of the Act committed by NMAC independent of the violations committed by Freedom Nissan. KRS 367.610 is intended to permit a consumer to assert defenses he has with respect to the original lessor against the assignee of the lease, regardless of whether the assignee is a holder in due course. It does not follow that the assignee of the lease is thereby granted immunity from all other provisions of the Act, which would be the result under the interpretation urged by NMAC. NMAC's interpretation of the section produces an irrational result, and we reject its interpretation.

Next, NMAC contends that, pursuant to the holding in Ford Motor Company v. Mayes, Ky. App. 575 S.W.2d 480 (1978), the Consumer Protection Act does not provide an independent basis for punitive damages, and because Hawkins' counterclaim was based exclusively upon liability under the Consumer Protection Act, Hawkins was required to specifically, in his pleadings, demand punitive damages. NMAC argues that since Hawkins did not, in his pleadings, specifically demand recovery of punitive damages, then he was not entitled to an instruction on punitive damages.[2] We disagree.

NMAC is correct that Ford Motor held that the Consumer Protection Act does not provide an independent claim for punitive damages, and that in his answer and counterclaim, Hawkins did not specifically request punitive damages. However, in his answer

[2]While this provision is contained in Chapter 367, it is not part of the Consumer Protection Act, see 367.120(2), and this is a mischaracterization by NMAC.

and counterclaim Hawkins requested that the court "grant him judgment against [NMAC] on his Counterclaim herein, together with such other relief to which he may be entitled[.]" (Emphasis added). Moreover, subsequent to Ford Motor the legislature enacted KRS 411.186, which provides statutory authority for the awarding of punitive damages. We are persuaded that Hawkins' counterclaim, the relief requested therein, and KRS 411.186 entitled him to a punitive damages instruction. See CR 54.03(2); Fergerson v. Utilities Elkhorn Coal Co., Ky., 313 S.W.2d 395 (1958).

Next, NMAC contends that the punitive damages instruction violated the holdings of Pacific Mutual Life Insurance Co. V. Haslip, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed. 1 (1991), and Hanson v. American National Bank, Ky., 865 S.W.2d 302 (1993). Haslip and Hanson hold that instructions to the jury must define the purpose of punitive damages as punishment to the wrongdoer and as a deterrent to wrongdoers and others from such activities in the future. While NMAC did oppose the giving of a punitive damages instruction, in its brief, NMAC does not cite us to its objection to the exclusion of a Haslip instruction or its tendering of such an instruction as required by CR 76.12(4)(c)(iv) (requiring an argument to contain "a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." This argument is accordingly not preserved for our review. CR 51(3); Owens-Corning Fiberglas Corp. v. Golightly, Ky., 976 S.W.2d 409, 416 (1998). It is well established that error must be precisely

preserved and identified in the trial court before it can be considered by an appellate tribunal. Skaggs v. Assad, Ky., 712 S.W.2d 947 (1986). This rule has arisen because the appellate court is under no duty to search the record for errors of law, Ventors v. Watts, Ky. App., 686 S.W.2d 833 (1985), and as such, the appellant must identify the alleged error with specificity. Young v. Newsome, Ky., 462 S.W.2d 908 (1971).

In conjunction with the above argument, NMAC contends that the $20,000.00 punitive damages award was excessive. We disagree.

A reviewing court may not substitute its judgment for that of the jury as to the appropriate amount of exemplary damages. Hanson v. American National Bank and Trust Company, Ky., 865 S.W.2d 302, 311 (1993). The question of whether a jury's verdict is excessive is within the trial court's discretion, and an award will be overturned only if there has been an abuse of discretion. Davis v. Graviss, Ky., 672 S.W.2d 928, 932-933 (1984). In this case, there was no such abuse. The purpose of punitive damages is to punish an entity for engaging in impermissible conduct. See KRS 411.184(1)(f) (punitive damages are "awarded against a person to punish and to discourage him and others from similar conduct in the future").

In this case, Hawkins described a three-year pattern of oppression by NMAC. According to Hawkins' testimony, NMAC arrogantly refused to listen to his reasonable request to rescind the contract based upon Freedom Nissan's fraud, destroyed his credit under false pretenses, and filed a lawsuit into the public

records in which it falsely accused Hawkins of detaining the vehicle, though in fact Hawkins had invited and encouraged NMAC to pick up the vehicle within a few days of his forced possession of it. In view of this conduct, we will not disturb the jury's punitive damages award.

Next, NMAC contends that the trial court erred when it failed to direct a verdict in its favor on its breach of contract claim, and that the trial court improperly instructed the jury on the claim. We disagree.

Construing the evidence presented at trial in the light most favorable to Hawkins, the lease contract submitted by Freedom Nissan to NMAC contained sufficient alterations and changes to place NMAC on notice that the contract had been materially altered by Freedom Nissan. It follows that NMAC was not a holder in due course, and that Hawkins was entitled to assert any defenses to the lease contract he had with respect to Freedom against NMAC. F.D.I.C. v. Gamaliel Farm Supply, Inc., Ky. App., 726 S.W.2d 709, 711 (1987). Since the evidence further showed that Freedom obtained the lease contract by fraud, Hawkins was entitled to assert fraud in the inducement as a defense against NMAC. Gamaliel at 712. Based upon the fraud committed by Freedom Nissan, it was not palpably and flagrantly against the evidence for the jury to return a verdict in favor of Hawkins, and NMAC was not entitled to a directed verdict.

In conjunction with the above argument, NMAC also complains that the trial court improperly instructed the jury regarding the effect of a finding that NMAC was not a holder in

due course. NMAC contends that in the event that it was found not to be a holder in due course, then the jury should have been further instructed regarding any affirmative defenses Hawkins had against Freedom Nissan assertable against NMAC.[3]

NMAC, however, has failed to provide citations to the record demonstrating that it requested and tendered to the trial court such an instruction. Therefore, we will not address this issue on the merits. See CR 51(3); CR 76.12(4)(c)(iv); Owens-Corning Fiberglas v. Golightly, supra; Skaggs v. Assad, supra; Ventors v. Watts, supra; and Young v. Newsome, supra.

Finally, NMAC contends that it is entitled to a new trial because the trial court improperly restricted its access to discovery from Hawkins. According to NMAC, the only pretrial information it was able to obtain directly from Hawkins about the case was through a telephone deposition on March 25, 1999, and that as a result of a tape recorder malfunction, it was unable to record the deposition. NMAC further contends that Hawkins failed to respond to certain written discovery requests until the day before trial. The standard of review on appeal of a trial court's rulings regarding sanctions for a discovery violation is whether the trial court abused its discretion. Greathouse v. American Natl. Bank & Trust Co., Ky. App., 796 S.W.2d 868, 869-870 (1990).

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[3]Jury Instruction No. 1 stated "If the jury reasonably believes according to the evidence that Nissan Motor Acceptance Corp. took the assignment of the written lease, for value, in good faith and without notice that the lease contains unauthorized signatures or contains material alterations such as to call into question its authenticity then you are to find for Nissan, otherwise you are to find for Dale Hawkins."

This case was filed in June 1996; trial was held in June 1999. NMAC, in other words, had three years to pursue a deposition. It appears that NMAC did depose Hawkins telephonically in March 1999, but because of its own technological errors, it did not receive the full benefit of the deposition. Regarding the written discovery, it does not appear that NMAC filed a motion to compel discovery pursuant to CR 37.01, and, upon considering the circumstances of the case, we are not persuaded that the trial court abused its discretion in its rulings with respect to the discovery issues raised by NMAC.

The judgment is affirmed in part and reversed in part.

EMBERTON, JUDGE, CONCURS.

GUDGEL, CHIEF JUDGE, CONCURS IN PART AND DISSENTS IN PART.

GUDGEL, CHIEF JUDGE, CONCURRING IN PART AND DISSENTING IN PART: The majority opinion sanctions the maintenance of a cause of action against appellant under the Consumer Protection Act (act) for false, misleading, and deceptive acts and practices in the conduct of trade or commerce, even though appellant's business activities simply do not fall within the plain meaning of the language used to define the words "trade" and "commerce" for purposes of liability under that act. See KRS 367.110(2). Because the majority opinion impermissibly expands the act's scope of liability in disregard of sound principles of statutory construction and without the citation of any supporting authority, I must respectfully dissent in part from that opinion.

KRS 367.220 confers a right upon consumers to bring actions for damages against persons who have employed methods, acts, or practices declared unlawful by KRS 367.170. KRS 367.170(1) specifies that unlawful acts include "[u]nfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce . . . ." For purposes of KRS 367.170, "trade" and "commerce" are defined by KRS 367.110(2) as meaning

> the advertising, offering for sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value, and shall include any trade or commerce directly or indirectly affecting the people of this Commonwealth.

KRS 367.120 provides that the act is intended to apply to "sellers of goods and services."

Given these statutory provisions, it is clear that unless the assignment of the lease contract between appellee and the car dealer amounted to either the sale of goods and services by appellant, or the "advertising, offering for sale, or distribution of any services and any property," appellant can have no liability to appellee under KRS 367.170. See KRS 367.110(2). Unlike the majority, I am convinced that for purposes of the act, appellant's business activities as a matter of law did not amount to either the sale of goods or services, or the conduct of trade or commerce.

The record shows that appellant basically is a finance company which engages in the business of acquiring discounted car loans and leases from car dealers by assignment, and that it purchased the disputed lease herein from the car dealer which

leased a vehicle to appellee. In a nutshell, the majority concludes that for purposes of KRS 367.110(2), appellant distributes services to the public and therefore engages in "trade" or "commerce" by conducting a finance company business which purchases discounted car loans and leases from car dealers. I find nothing in the statute's language to justify such a conclusion.

Unlike a company which sells pest control, plumbing, or other services to consumers, appellant merely provides the risk capital used by car dealers to finance sales and leases of automobiles to consumers. In my opinion, by no stretch of the imagination can such a process be deemed to constitute the sale or distribution of services to consumers. The majority not only fails to cite any authorities to support its views, but its conclusions are unwarranted as extending the scope of the act far beyond its intended purpose. This is especially true here since, unlike the typical situation between a consumer and a seller of goods or services, the parties had no direct dealings with one another until after appellant was assigned the car lease. Further, the absence of applicable citations of authority to support the majority's view suggests that no other courts have reached conclusions similar to the majority's, even though the marketplace includes numerous finance companies which operate businesses like appellant's. Even more important is the fact that, in a subsection entitled "Consumer Credit Contracts," KRS Chapter 367 specifically addresses the type of contract now before us. See KRS 367.600 and KRS 367.610. A review of the

statutes in that subsection clearly shows that they, rather than KRS 367.170, govern the parties' rights herein.

Because I believe that KRS 367.170 as a matter of law does not apply to appellant's business, I would reverse so much of the court's judgment as awards compensatory damages, punitive damages, and attorney fees against appellant with regard to appellee's KRS 367.220(1) claims. However, I agree that the court's judgment should be affirmed insofar as it adjudges that appellant is not entitled to recover the balance due on the lease contract itself.

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