NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 CA 0092

HENRY B. KING, JR.

VERSUS

ALL STAR TOYOTA OF BATON ROUGE
AND XYZ INSURANCE COMPANY

Judgment Rendered: SEP 16 2016

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On Appeal from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Trial Court No. 593,966, Sec. 24

The Honorable R. Michael Caldwell, Judge Presiding

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BEFORE: PETTIGREW, McDONALD, AND DRAKE, JJ.

DRAKE, J.

Henry B. King appeals the trial court's judgment granting the motion for involuntary dismissal by All Star Toyota of Baton Rouge (All Star). For the following reasons, we affirm the judgment of the trial court.

FACTS AND PROCEDURAL HISTORY

On October 13, 2008[1], King purchased from All Star a 2005 Ford Explorer for $12,500.00. On August 25, 2010, King filed a Petition in Redhibition against All Star, claiming that the vehicle was defective. Michael Dorsey, an All Star employee, testified that on August 28, 2008, before King purchased the used vehicle, All Star repaired a drive belt, a brake light, wiper blades, two tires, and the front brakes.

King testified that he actually took delivery of the vehicle on October 12, 2008, even though all of the purchase documents are dated October 13, 2008, and that he returned to All Star the next day because the "check engine" light came on. However, Dorsey's testimony was that the vehicle was brought to All Star on October 20, 2008, which is the date of the corresponding invoice. On this visit, All Star determined that the "check engine" light was due to the sensors determining that the air was more dense than it actually was, which caused the injectors to inject more fuel than necessary. All Star corrected the problem and returned the vehicle to King on October 21, 2008.

On December 29, 2008, King again took the vehicle to All Star because the "check engine" light came back on. Dorsey testified that the "check engine" light was due to a different problem than that of the October 2008 visit. This time, there was an evaporative emissions leak. All Star replaced a valve and repaired a

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[1] This court notes that the petition stated that King purchased the vehicle on November 12, 2008. However, the evidence submitted at trial shows that the vehicle was purchased on October 13, 2008, and King's brief to this court also refers to October 13, 2008, as the purchase date.

squeaking noise in the rear. Dorsey testified that the code for this problem was not present on October 13, 2008, when the vehicle was initially brought to All Star. Dorsey explained that the "check engine" light was for two different problems, one a fuel vapor issue and one an incoming air mixture issue, the latter which was not present initially. Additionally, the solenoid and sway bar were replaced at this time, due to a noise in the rear of the vehicle. All Star returned the vehicle to King on January 7, 2009.

On January 27, 2009, King again brought the vehicle back to All Star for the "check engine" light. Dorsey admitted that the "check engine" light this time was for the same problem as the previous visit, an evaporative emissions leak. All Star repaired the fuel tank, engine gaskets, and lube gaskets, and returned the vehicle on February 12, 2009.

On June 17, 2009, King brought the vehicle to All Star for excessive oil consumption and a smell. All Star did tests, put in a filter, and began an oil consumption test, which could not be completed in one visit. All Star replaced the fan clutch and changed the oil on this visit. All Star also requested that King monitor the mileage to compare the oil consumption. The vehicle was returned to King on June 19, 2009.

On July 17, 2009, King brought the vehicle back to All Star because of excessive oil consumption. All Star did find an external oil leak and replaced a front crank seal. The oil leak was discovered by a visual inspection. Dorsey explained that the leak was not discovered at the June 17, 2009 visit because nothing was leaking on the ground at the time, and the leak must not have been very bad at that time. The vehicle was returned to King on July 28, 2009.

On August 31, 2009, King again brought the vehicle to All Star for excessive oil consumption. At this visit, All Star was able to determine that the vehicle had been driven 1,330 miles. The warranty company noted that the Ford

specification was one quart of oil for every 15,000 miles; therefore, the vehicle was within the specifications. King claimed that All Star kept the vehicle until September 2, 2009, but refused to perform any work on the vehicle.

King claimed that because of the "check engine" light and the excessive oil consumption, he was unable to drive the vehicle and was unable to get an inspection sticker or emission test sticker. King testified that All Star told him the vehicle needed a ring and engine replacement.

On cross-examination, King admitted that when he bought the vehicle it was three-years old. King purchased an extended warranty that covered twenty-four months from the purchase date of the vehicle or 24,000 miles traveled. The evidence also showed that when King purchased the vehicle, it had 65,333 miles on it. All Star was able to show that it repaired the vehicle on two occasions with regard to the "check engine" light. On January 27, 2009, All Star discovered that the fuel tank had been damaged, which it repaired. King admitted that between January 27, 2009, and June 17, 2009, he was able to drive the vehicle.

On June 17, 2009, King brought the vehicle to All Star because the engine was using too much oil. At this time the mileage on the vehicle was 71,521. King admitted that between October 2008 and June 2009, he did not change the oil in the vehicle or have any other person change the oil. At this visit, All Star instructed King to record the oil level every 200 miles until a quart of oil had been used in order to determine the oil consumption of the vehicle. King could not recall if he actually followed those instructions, but he was able to drive the vehicle away from All Star.

On July 17, 2009, King again brought the vehicle to All Star complaining of excessive oil consumption and a noise. All Star replaced the crank seal, but could not duplicate the complained of noise. On August 31, 2009, King again brought the vehicle to All Star complaining of excessive oil consumption, but All Star

could not duplicate the problem and said the vehicle was within specifications. The extended warranty company did not cover the repairs since the vehicle was within specifications.

King admitted he drove the vehicle from October 2008 until the inspection was denied sometime after August 31, 2009. On August 31, 2009, the vehicle had 73,787 miles on it, and King admitted he had not changed the oil since he purchased the vehicle. He denied driving the vehicle after that date except to bring it to an expert for inspection. On cross-examination, King admitted that the vehicle has 87,000 miles on it. The expert hired by King submitted a report with an estimate for a used motor with 117,000 miles.

King's expert did not appear for trial, and the trial court granted him a continuance to complete his evidence. On the second day of the trial, the expert again did not appear.

At the close of King's case-in-chief, the trial court granted All Star's motion for involuntary dismissal pursuant to La. C.C.P. art. 1672(B), and a judgment in accordance with that ruling was signed on September 9, 2015. It is from this judgment that King appeals.

ERROR

King claims that the trial court erred in granting All Star's motion for involuntary dismissal, dismissing King's case.

LAW AND DISCUSSION

Standard of Review

The trial court's grant of an involuntary dismissal is subject to the manifest error standard of review. *Broussard v. Voorhies,* 2006-2306 (La. App. 1 Cir. 9/19/07), 970 So. 2d 1038, 1041-42, *writ denied,* 2007-2052 (La. 12/14/07), 970 So.2d 535. Accordingly, in order to reverse the trial court's grant of involuntary dismissal, we must find that there is no factual basis for the trial court's finding or

that the finding is clearly wrong. *Broussard,* 970 So. 2d at 1042. *See also Stobart v. State through Dept. of Transp. and Development,* 617 So. 2d 880, 882 (La. 1993). The issue is not whether the trial court was right or wrong, but whether its conclusion was reasonable. *Stobart,* 617 So. 2d at 882. An appellate court must always keep in mind that if the trial court's findings are reasonable, it may not reverse, even if convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Stobart,* 617 So. 2d at 882-83. Further, an appellate court must do more than just simply review the record for some evidence that supports or controverts the trial court's findings; it must review the entire record to determine whether the trial court's finding was manifestly erroneous. *Stobart,* 617 So. 2d at 882.

Because an involuntary dismissal of an action pursuant to Article 1672(B) is based on "facts and law," a review of the substantive law applicable to the King's case is necessary. The primary issue to be decided in this case is whether King carried his burden of showing a redhibitory defect. The existence of a redhibitory defect is a question of fact and the trial court's conclusion should not be disturbed in the absence of manifest error. *Rhodes v. All Star Ford, Inc.,* 599 So. 2d 812, 814 (La. App. 1 Cir. 1992).

The seller warrants the buyer against redhibitory defects, or vices, in the thing sold; a defect is redhibitory when it renders the thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect, or else of such diminished usefulness and value that the buyer would only have purchased the thing for a lesser price. The existence of a redhibitory defect gives the buyer the right to obtain rescission of the sale where the thing is rendered useless, or the right to have the price reduced where the thing is found to be of lesser value as a result. *See* La. C.C. art. 2520. However, the seller owes no warranty for defects that were either known to the

buyer at the time of the sale, or discoverable by a reasonably prudent buyer. *See* La. C.C. art. 2521.

In a suit for redhibition, the plaintiff must prove: 1) the seller sold the thing to him and it is either absolutely useless for its intended purpose or its use is so inconvenient or imperfect that, judged by the reasonable person standard, had he known of the defect, he would never have purchased it; 2) the thing contained a non-apparent defect at the time of sale; and 3) the seller was given an opportunity to repair the defect. *McNeely v. Ford Motor Co., Inc.,* 98-2139 (La. App. 1 Cir. 12/28/99), 763 So. 2d 659, 669, *writ denied,* 2000-0780 (La. 4/28/00), 760 So. 2d 1182; *Vincent v. Hyundai Corporation,* 633 So. 2d 240, 243 (La. App. 1 Cir. 1993), *writ denied,* 93-3118 (La. 2/11/94), 634 So. 2d 832.

A defect is presumed to have existed before the sale if it manifests itself within three days immediately following the sale. *See* La. C.C. art. 2530; *Rhodes,* 599 So. 2d at 814. However, later appearing defects do not enjoy this presumption as a matter of law. *See Rhodes,* 599 So. 2d at 814. Nonetheless, as this court has previously recognized, "in the absence of other explanations, later appearing defects may be inferred to have pre-existed the sale, when such defects do not usually result from ordinary use." *Rhodes,* 599 So. 2d at 814.

To establish a prima facie case of redhibition, a purchaser must show that a non-apparent defect existed at the time of the sale. La. C.C. arts. 2520 and 2530; *Belle Pass Terminal, Inc. v. Jolin, Inc.,* 92-1544 (La. App. 1 Cir. 3/11/94), 634 So. 2d 466, 494, *writ denied,* 94-0906 (La. 6/17/94), 638 So. 2d 1094. "Defect" as contemplated in article 2520 means a physical imperfection or deformity or a lacking of the necessary components or level of quality. *Belle Pass Terminal,* 634 So. 2d at 494. Once the purchaser establishes a prima facie case, the burden shifts to the seller to show that he can somehow escape liability. *Id.*

All Star argues that King did not present a *prima facie* case of redhibition, so the burden never shifted to it to prove otherwise. Also, All Star claims that King presented no expert evidence as to the cause of any redhibitory defect. King testified that he was unable to get an inspection sticker for the vehicle, but did not explain why.

King claims that the burden shifted to All Star, because he purchased the vehicle on October 13, 2008, and returned it to All Star on that day for repair of the "check engine" light.[2] The problem indicated by the All Star invoice and Dorsey's testimony show that the vehicle was brought in on October 20, 2008, more than three days after the purchase. The trier of fact is free to accept or reject in whole or in part the testimony of any witness. *Commercial Flooring and Mini Blinds, Inc. v. Edenfield,* 2013-0523 (La. App. 1 Cir. 2/14/14), 138 So. 3d 30, 40. Therefore, King is not entitled to a presumption of a defect. However, even if the court presumes that the vehicle was returned the next day, as King testified, the problem for which it was returned was the "check engine" light, which was repaired and had nothing to do with the later discovered excessive oil consumption. There is no evidence in the record that King was unable to get an inspection sticker or that the vehicle was useless, or its use so inconvenient that it must be presumed King would not have purchased the vehicle, due to the "check engine" light. The problems with the oil consumption did not begin until June 17, 2009. Therefore, King cannot rely on the excess oil consumption as the redhibitory defect that existed when he bought the vehicle. *See* La. C.C. arts. 2520 and 2530.

We agree with All Star that the present case is similar to *Green v. Benson and Gold Chevrolet,* 2001-1161 (La. App. 5 Cir. 2/26/02), 811 So. 2d 970, 975,

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[2] King actually testified at trial that he took delivery of the vehicle on October 12, 2008, and returned it to All Star on October 12, 2008.

writ denied, 2002-0891 (La. 5/31/02), 817 So. 2d 96, where the appellate court affirmed the trial court's granting of an involuntary dismissal of the plaintiff's redhibition claim of a vehicle. The plaintiff had purchased a used vehicle from the defendant and immediately began experiencing problems with it. The plaintiff returned the vehicle to the defendant several times for repairs. *Id.* at 972. Although the plaintiff testified as to various problems and times she had the vehicle repaired, there was no evidence that any part of the vehicle was defective. *Id.* at 975. The appellate court held that, although the plaintiff proved that she experienced problems with the vehicle, which began almost immediately after she purchased it, she failed to prove by a preponderance of the evidence that the repairs were due to a defect in the vehicle. *Id.*

Here, the trial court noted that, although King initially brought the vehicle in for service for the "check engine" light, that was not the redhibitory defect with the vehicle. This court notes that all the issues with the "check engine" light were repaired. As the trial court found, the problem was the issue of excessive oil consumption, which did not begin until June 17, 2009. The evidence at trial was that the vehicle was within the specifications for oil consumption. King continued to use the vehicle for at least 10,000 more miles. The trial court noted that although King was unable to get an inspection sticker, such was unrelated to the oil consumption. We agree with the trial court that there was no testimony that the failure to get an inspection sticker was related to the oil consumption.

King proved that he experienced problems with the vehicle, but not that the repairs were due to a defect in the vehicle. King admitted that he drove the vehicle for 10,000 miles after the last visit to All Star in August 2009, but never had the oil changed or did any maintenance to the vehicle. We conclude that King failed to meet his burden of proof as to whether there was a defect in the vehicle, and we find no manifest error in the trial court's dismissal of his claim for redhibition.

CONCLUSION

For the above and foregoing reasons, the trial court's judgment of September 9 2015, in favor of defendant, All Star Toyota of Baton Rouge, granting the motion for involuntary dismissal is affirmed. Costs of this appeal are assessed against plaintiff, Henry B. King.

AFFIRMED.