STATE OF MICHIGAN

COURT OF APPEALS

BRYAN TOMCZYK,

Plaintiff-Appellant,

v

CARL THOMPSON CHEVROLET,

Defendant-Appellee.

UNPUBLISHED
March 31, 1998

No. 188577
St. Clair Circuit Court
LC No. 93-001596 CV

Before: Fitzgerald, P.J., and Markey and J. B. Sullivan*, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court orders granting defendant relief from the initial judgment and granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) in this action concerning the purchase of a used car. We affirm the former and reverse the latter.

Plaintiff first argues that the trial court abused its discretion in setting aside a judgment entered after defendant and defense counsel failed to appear for trial. We disagree. Contrary to the facts of *Lark v The Detroit Edison Co*, 99 Mich App 280; 297 NW2d 653 (1980), and *Kibby v Rhoads*, 29 Mich App 261; 185 NW2d 117 (1970), this case does not present a situation where defendant consciously made an ill-advised decision not to appear at trial. We acknowledge that this Court has affirmed a trial court's decision not to allow relief from judgment where the attorney neglected to stay apprised of the status of the case. *Young v Everlock Taylor Corp*, 137 Mich App 799, 803; 359 NW2d 213 (1984). However, as noted in *Muntean v Detroit*, 143 Mich App 500, 508-511; 372 NW2d 348 (1985), this question is for the most part controlled by the standard of review. We are not persuaded that the lower court's decision to grant relief from the judgment in this case was an abuse of discretion.

Plaintiff next argues that the trial court erred in granting defendant's motion for summary disposition as to plaintiff's fraud claim. We agree.

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Because we are reviewing defendant's motion for summary disposition, we view the facts in the light most favorable to plaintiff. We must also make all reasonable inferences in plaintiff's favor. *Bertrand v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1995).

Defendant attached plaintiff's deposition to the motion for summary disposition to provide the account of the conversation between the salesperson and plaintiff concerning the car. Unfortunately, the account is not entirely clear, in part due to plaintiff's repeated, but unsuccessful, attempts to remember the exact words that were spoken.

Plaintiff, who has no mechanical skills regarding cars beyond checking and changing the oil, went to defendant's car lot looking for a used car to provide dependable transportation. Although he "can't be 100% accurate," he believes that when he arrived at the lot, he told the salesperson that he was looking for reliable transportation. The order of the events and conversations is unclear. However, at some point before the purchase, plaintiff explained to the salesperson that plaintiff did not understand anything about vehicles other than what the salesperson was going to tell him. Plaintiff's deposition indicates that he and the salesperson discussed the car's mechanical condition and its importance to him, but, plaintiff had difficulty remembering the salesperson's exact words.

> *Q*: . . You said that the salesman indicated the mechanical shape the car was in, or you said, it was in. What specifically did he say about the mechanical shape of the car.
>
> *A*: He believed that it was in, I can't exactly remember the words he used. I can't remember.
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> * * *
>
> *Q*: And as you sit here today you don't recall the words that the salesman used?
>
> *A*: I asked for a – I told the salesman the reason I am purchasing this vehicle is not because of its looks, and the exterior. I was purchasing it because of its mechanical - uh, mechanical –
>
> *Q*: Take your time. It's no big deal. Just take your time and try to recall . . . .
>
> * * *
>
> *Q*: . . .You told the salesman you were looking for reliable transportation. Is that what you recall telling him?
>
> *A*: Not just reliable. I mean, I wanted it in - as far as mechanical shape goes, he was selling me the car that had 36,000 miles on it and I explained to him I did not understand anything about vehicles other than what he was going to tell me.

Q: Okay. That's fine. So what did he tell you?

A: As far as - as far as it goes he says it was - there was nothing wrong with the vehicle.

Plaintiff was allowed to test drive the car in defendant's parking lot, and did so for two minutes. When asked why he chose to drive this car, plaintiff explained:

> As I mentioned earlier, I was looking for a reliable form of transportation. The Escort wagon, which the salesman had mentioned that it had the low miles, the low original miles, the mechanical shape that the vehicle was in.

That same day, plaintiff signed a purchase agreement that stated "SOLD AS IS. THERE IS NO WARRANTY EITHER EXPRESSED OR IMPLIED." Plaintiff also signed a buyer's guide form that stated, "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."

On the second day after the purchase, plaintiff took the car to a gas station for maintenance. The mechanic looked inside the engine compartment and took off the air cleaner "which was held on by something rigged with a coat hanger." The mechanic also found other problems involving the head gasket, a boot and the emergency brake. Plaintiff later discovered the heater core was "rotten."

The trial court's opinion granting defendant's motion for summary disposition explained the court's reasoning as follows:

> It is the opinion of this Court that the Plaintiff has put forth no evidence, other than bare allegation, that shows this to be a case of fraudulent misrepresentation. Although drawing all inferences in favor of the responding party, as this Court is required to do in considering a MCR 2.116(C)(10) motion, the Court does not find any of the alleged statements by Defendant's agent to be more than a generalized opinion.
>
> The fraudulent representations alleged to have been made by Defendant's agent concerned the quality of the automobile sold. These representations go no farther than the terms of the purchase agreement which was clear and unambiguous when it was executed pursuant to an "as is" clause. Furthermore, this Court is not convinced that the Plaintiff's ability to negotiate fair terms and/or make an informed decision about the purchase of the vehicle was undermined by any alleged statements made by Defendant's representatives.

Plaintiff argues and we agree that the "as is" clauses in the purchase agreement and the buyer's guide form do not preclude a fraud claim. *Clemens v Lesnek*, 200 Mich App 456, 460; 505 NW2d 283 (1993) and cases cited therein. Contrary to defendant's assertion, *McGhee v General Motors Corp*, 98 Mich App 495; 296 NW2d 286 (1980) does not compel a different conclusion. In that case, this Court affirmed the grant of summary disposition to the defendant, not based solely on the "as is" clause, but also because the purchaser was an experienced truck mechanic and neither the purchaser

nor the seller was aware of the hidden mechanical defect. The case does not stand for the principle that an "as is" clause by itself precludes a fraud claim. In summary, defendant was not entitled to summary disposition on plaintiff's fraud claim simply because of the "as is" clause.

In response to the trial court's conclusion that the salesperson's alleged statements were nothing more than a generalized opinion, plaintiff argues that even if the statements were opinion, the salesperson was under a duty to disclose the condition of the car because his statements gave a false impression of the car's condition. Plaintiff cites *Michigan Nat'l Bank v Marston*, 29 Mich App 99, 104; 185 NW2d 47 (1970) for the principle that the failure to disclose a material fact necessary to prevent a false impression is as much a fraud as a positive misrepresentation.

The silent fraud doctrine recognizes that suppression of the truth with intent to defraud is as prejudicial as an assertion of a falsehood. *Lorenzo v Noel*, 206 Mich App 682, 684; 522 NW2d 724 (1994). "'[S]uppression of a material fact, which a party in good faith is duty-bound to disclose, is equivalent to a false representation and will support an action in fraud.'" *Id.* at 684-685. A duty to disclose has been found in sales transactions, particularly where as here, the purchaser has expressed concern or made a direct inquiry, and the seller fails to disclose material facts. See *Groening v Opsata*, 323 Mich 73; 34 NW2d 560 (1948); *Sullivan v Ulrich*, 326 Mich App 218; 40 NW2d 126 (1949). See also *Toering v Glupker*, 319 Mich 182, 186-187; 29 NW2d 277 (1947), in which the absence of "misleading partial statements, half truths or other misleading factors" was fatal to a purchaser's fraud claim based on the seller's failure to disclose the model year of the tractor sold.

We need not resolve whether plaintiff's action could proceed as a silent fraud claim because we conclude that reasonable minds could disagree whether the salesperson's statement that there was "nothing wrong" with the car was a statement of fact rather than an opinion. Defendant relies in part on *Graham v Myers*, 333 Mich 111; 52 NW2d 621 (1952) in which the purchaser testified that when he asked what shape the car was in, he was told it was in "'good shape—a nice, clean car." *Id.* at 114. The Court, holding that the defendants' motion for directed verdict should have been granted, noted that a mere expression of an honest opinion will not be regarded as fraud. *Id.* at 115.

We find *Graham* distinguishable. The representations in *Graham,* "good shape", "nice", "clean", indicated that the speaker was offering a subjective evaluation of the car. In contrast, a statement that there is "nothing wrong" with the car suggests that the speaker has knowledge that the car is mechanically sound and that it does not need repair. Had the salesperson added a qualifying term, as in "there is nothing major wrong with the car," we might reach a different result. However, where as here, the salesperson made a statement in absolute terms about the existing condition of the car, we believe that reasonable minds could conclude that it was a statement of fact Therefore, defendant was not entitled to summary disposition on the basis that the salesperson's statement was only a generalized opinion.

In conclusion, we affirm the order granting defendant's motion for relief from judgment, and reverse the order granting defendant's motion for summary disposition.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Joseph B. Sullivan