APPELLANT PRO SE

James E. Ayers
Wernle Ristine & Ayers
Crawfordsville, Indiana

IN THE COURT OF APPEALS OF INDIANA

James E. Ayers,
Appellant-Defendant,

v.

Jackie Stowers,
Appellee-Plaintiff.

December 8, 2022

Court of Appeals Case No.
22A-SC-295

Appeal from the
Clinton Superior Court

The Honorable
Justin H. Hunter, Judge

Trial Court Case No.
12D01-2109-SC-212

Najam, Senior Judge.

Statement of the Case

[1] James Ayers appeals from a judgment entered on a small claim for breach of contract arising from the sale of a 2002 Chevrolet Trailblazer. Jackie Stowers sold the vehicle to Ayers. Soon thereafter, the vehicle's brakes failed while Ayers was driving. Ayers informed Stowers that he revoked acceptance of the

vehicle, alleged that Stowers had committed fraud in the inducement of the sale, and stopped payment on the check he had written Stowers for the purchase price. Stowers filed a claim for damages, and Ayers countered with an answer and affirmative defenses. After a hearing, the trial court entered a money judgment for Stowers. Ayers now appeals. Finding no reversible error in the trial court's judgment, we affirm.

Facts and Procedural History

[2] On the evening of March 8, 2021, Ayers went to Stowers' residence for the purpose of purchasing a 2002 Chevrolet Trailblazer. George Boyle, who works for Ayers and is an acquaintance of Stowers, arranged the purchase and was also present on March 8. After a short test drive, Ayers asked Stowers about a rattling noise during braking. Stowers acknowledged there was a noise due to the brakes not being bled when the vehicle was last serviced. Ayers gave Stowers a check for $1,800 and drove away in the Trailblazer. On a curve in the road on his way home, Ayers experienced a loss of brakes. The Trailblazer left the road, traveled through an apple orchard, and came to rest nose down in a ditch.

[3] The following morning, Ayers and Boyle returned to the scene of the accident and called Stowers to inform him of the accident and the issuance of a stop payment order on the check. Ayers had the Trailblazer towed to a parking lot, from which Stowers eventually retrieved it.

[4] On September 24, Stowers filed a Notice of Claim for $10,000 in damages, including treble damages of $5,400, alleging that at the time of sale, Ayers had issued a check for $1,800 for the purchase price and then stopped payment on the check. Ayers filed an answer and affirmative defenses. Following a trial, the court found there was no evidence to support Stowers' claim that he was entitled to recover a multiple of his actual damages. The court entered judgment for Stowers in the amount of $1,456, representing the sale price of $1,800 plus a towing bill, minus a set-off for the salvage value of the vehicle and court costs. Ayers moved to correct error, which the trial court denied. This appeal ensued.

Discussion and Decision

[5] As a preliminary matter, we observe there is no appellee's brief. Although Stowers attempted to file a brief, it was defective, and the defect was never corrected. Where an appellee fails to file a brief, we do not undertake to develop arguments on that party's behalf; rather, we may reverse upon a prima facie showing of reversible error by the appellant. *Morton v. Ivacic*, 898 N.E.2d 1196, 1199 (Ind. 2008). Prima facie error is error "at first sight, on first appearance, or on the face of it." *Front Row Motors, LLC v. Jones*, 5 N.E.3d 753, 758 (Ind. 2014). This "prima facie error rule" relieves this Court from the burden of controverting arguments advanced for reversal, a duty which remains with the appellee. *Simek v. Nolan*, 64 N.E.3d 1237, 1241 (Ind. Ct. App. 2016).

[6] Although a responsive pleading is not required in a small claims action, Ayers filed an answer and affirmative defenses. He now appeals from a negative judgment on his affirmative defenses of fraud, breach of implied warranty of fitness for a particular purpose, and revocation of acceptance.

> A judgment entered against a party bearing the burden of proof is a negative judgment. On appeal from a negative judgment, this Court will reverse the trial court only if the judgment is contrary to law. A judgment is contrary to law if the evidence leads to but one conclusion and the trial court reached an opposite conclusion. In determining whether the trial court's judgment is contrary to law, we will consider the evidence in the light most favorable to the prevailing party, together with all reasonable inferences therefrom. We neither reweigh the evidence nor judge the credibility of witnesses.

RCM Phoenix Partners, LLC v. 2007 E. Meadows, LP, 118 N.E.3d 756, 760 (Ind. Ct. App. 2019) (internal citations omitted) (quoting *Burnell v. State*, 56 N.E.3d 1146, 1149-50 (Ind. 2016)).

[7] Ayers also appeals from the denial of a motion to correct error. In his motion to correct error, Ayers contends that the trial court's judgment is "contrary to law and against the weight of the evidence." Appellant's App. Vol. II, p. 23. We review the denial of a motion to correct error for an abuse of discretion. *Kobold v. Kobold*, 121 N.E.3d 564, 570 (Ind. Ct. App. 2019), *trans. denied*. An abuse of discretion occurs when the judgment is clearly against the logic and effect of the facts and circumstances before the court or is contrary to law. *Id.* And when, as here, a bench trial has occurred, we will not reverse the judgment

of the trial court unless the decision is clearly erroneous. *DeVoe Chevrolet-Cadillac, Inc. v. Cartwright*, 526 N.E.2d 1237, 1239 (Ind. Ct. App. 1988). Thus, in this appeal both from a negative judgment and a motion to correct error, the only question presented is whether the trial court misinterpreted or misapplied the law to the facts.

[8] The trial court entered seventeen detailed findings and conclusions, several of which Ayers challenges. In an appeal from a small claims judgment, a trial court's special findings aid our review by providing us with a statement of the trial court's reasoning, but they do not alter the nature of our review. Special findings and the two-tiered standard of review under Trial Rule 52(A) do not apply in small claims proceedings. *Bowman v. Kitchel*, 644 N.E.2d 878 (Ind. 1995).

[9] This cause of action accrued when Ayers purported to revoke acceptance of the vehicle and stopped payment on the check. There are numerous secondary and collateral issues presented. For example, the parties dispute whether after the accident the brake reservoir was full or empty. Ayers contends that there was a "sudden evacuation of the line through a break, blowing all of the [brake] fluid onto the roadway." Appellant's App. Vol. II, p. 23 (Motion to Correct Error). Stowers, on the other hand, offered evidence that when he took possession of the vehicle following the accident, the brake reservoir was full. Tr. pp. 11, 46. It is undisputed that the brakes failed and that an accident occurred, but those facts alone are not dispositive. In order to determine whether Ayers was

entitled to nullify the sale, we must also consider the conduct of the parties before and during their meeting at which the sale occurred.

[10] Contending that Stowers is a merchant, Ayers asserts a right to the remedy of revocation of acceptance under the Uniform Commercial Code (UCC). The first requirement of a revocation of acceptance is that the goods are "'non-conforming.'" *Courtesy Enters., Inc. v. Richards Lab'ys*, 457 N.E.2d 572, 575 (Ind. Ct. App. 1983). "'Conforming' goods are goods consistent with the seller's obligations under its agreement with the buyer." *Id.*

[11] Here, as we discuss below, the vehicle was sold "as is." By definition, then, property sold "as is" constitutes conforming goods at the time of sale. Moreover, the record supports the trial court's conclusion that Stowers was not engaged in the business of selling motor vehicles but that he had engaged in only a few, occasional transactions. Thus, we agree with the trial court's finding that "There is no credible evidence that Stowers was a merchant with respect to vehicles—even if he has previously bought and sold vehicles to others." Appellant's App. Vol. II, p. 19 (Judgment ¶14). Accordingly, implied warranties of merchantability or fitness for a particular purpose are not implicated, and the revocation of acceptance remedy under Indiana Code section 26-1-2-608 is unavailable. The evidence demonstrates that the sale between Stowers and Ayers was an ordinary contract, not a contract for the sale of goods, and that the sale was not subject to the UCC.

[12] Ayers' contention is more properly characterized as a claim for common law rescission. Thus, the question becomes whether Ayers was entitled to rescind the sale based upon misrepresentation of a material fact. In his affirmative defenses, Ayers alleged fraud "for falsely and specifically claiming good brakes and [the subsequent] failure of the vehicle." *Id.* at 16.[1]

[13] At trial, Stowers argued, and the record supports, that the twenty-year-old vehicle was sold "as is." "As is" means "[i]n the existing condition without modification." *As Is*, BLACK'S LAW DICTIONARY (11th ed. 2019). "Generally, a sale of property 'as is' means that the property is sold in its existing condition," and use of the phrase 'as is' relieves the seller from liability to the purchaser for defects in that condition. *Id.*

[14] Ayers asserts, however, that the "as is" sale was nullified by Stowers' alleged misrepresentation that the brakes were in good working order. In order to rescind the sale based upon fraud, Ayers had the burden to prove that Stowers misrepresented a material fact uniquely within his knowledge, that Ayers had a right to rely on that misrepresentation, and that Ayers relied on that fact to his detriment. *See Heyser v. Noble Roman's Inc.*, 933 N.E.2d 16, 19 (Ind. Ct. App. 2010), *trans. denied* (2011). Resolution of this ultimate issue turns on whether Stowers had reason to believe, and did not disclose, that the brakes were

[1] On appeal, Ayers raises the issue of constructive fraud. However, he did not allege constructive fraud at trial, and a party may not raise an issue for the first time on appeal. *Spainhower v. Smart & Kessler, LLC*, 176 N.E.3d 258, 266 (Ind. Ct. App. 2021), *trans. denied* (2022).

defective and dangerous as well as the content of the brief conversation about the brakes between Ayers and Stowers at the time of the sale.

[15] When Ayers test drove the vehicle, he detected a "noise" in the brakes, which he immediately discussed with Stowers. Stowers disclosed and explained that the ABS braking system needed to be bled to remove air from the system and that, when the vehicle was last serviced, his mechanic had not bled the brakes because "their machine was down at that time." Tr. p. 7. Stowers testified that he had been driving the vehicle and that his wife "had been driving it around for two weeks" and "back and forth to work" prior to the sale and had encountered no braking issues. *Id.* at 18, 7. Ayers testified that Stowers told him, "There is nothing wrong with the brakes" but that the brakes failed soon after Ayers had taken possession of the vehicle. *Id.* at 25.

[16] The evidence shows that Stowers had no reason to believe that the brakes were not working at the time of sale, and, accordingly, the facts do not support an inference that Stowers knowingly failed to disclose that the brakes were defective. Instead, the evidence supports a judgment that Stowers expressed an opinion to the best of his knowledge and belief that the brakes were working. Although the brakes failed, that fact alone does not establish that Stowers' statement concerning the condition of the brakes amounted to a misrepresentation. As a general rule, actionable fraud cannot be based upon the expression of an opinion unless the declarant has superior knowledge. *Reeve v. Georgia-Pac. Corp.*, 510 N.E.2d 1378, 1383 (Ind. Ct. App. 1987). The record here supports the trial court's finding that "There is no evidence that Stowers

had superior knowledge over Ayres [sic] as to the dangerous condition created by driving a vehicle with brakes that weren't properly bled." Appellant's App. Vol. II, p. 18 (Judgment ¶11).

[17] The record also supports the trial court's related finding that "Stowers did not conceal that the brakes had not been properly bled the last time the brakes were serviced." *Id.* Thus, we conclude, as did the trial court, that Stowers did not misrepresent or conceal the condition of the brakes and that the facts did not establish either the intent to deceive or the reckless disregard required for a showing of actual fraud. *See Spainhower*, 176 N.E.3d at 266 (to prove actual fraud, plaintiff must prove that misrepresentation was made either with defendant's actual knowledge or with reckless disregard or ignorance as to its truth or falsity). The evidence supports the trial court's conclusion that Stowers did not misrepresent a material fact that would have entitled Ayers to rescind the sale.

[18] Finally, we note the trial court's conclusion that the parties may have misunderstood and failed to appreciate the danger and risk inherent in a hydraulic braking system containing air that had not been properly bled. When Ayers took delivery of the vehicle, he knew there was a noise in the braking system, which suggested that something was amiss. Nevertheless, he accepted the vehicle in that condition. This was not a latent or hidden defect. Ayers was placed on inquiry notice and charged with knowledge of what a reasonable inspection would have disclosed.

Conclusion

[19] We conclude the trial court did not err when it entered judgment in favor of Stowers and denied Ayers' motion to correct error.

[20] Affirmed.

Bailey, J., and Pyle, J., concur.