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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002652-MR
AND
NO. 1997-CA-002990-MR

GARY VINSON and
DEBRA D. VINSON — APPELLANTS

v.

APPEALS FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 95-CI-00518

UNIVERSITY AUTO SALES, INC. — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE, KNOX, AND MCANULTY, JUDGES.

KNOX, JUDGE: Appellants, Gary and Debra Vinson (the Vinsons), appeal the trial order and judgment entered by the Warren Circuit Court following a jury trial on alleged violations of the Kentucky Consumer Protection Act, as well as breach of warranty, failure to exercise reasonable and ordinary care in the performance of services, conversion, and claims of products liability and unfair trade practices. In consideration of the numerous issues raised on appeal, we believe a summary of the facts, proceedings, and results will be insightful.

In February 1993, the Vinsons purchased a Subaru Legacy postal wagon from University Auto Sales, Inc. (University). At the time of purchase, University offered the Vinsons the option of applying with Subaru for an extended service contract, for an additional cost of $998.00[1] above the vehicle's purchase price. The Vinsons opted to apply for the extended protection and paid a total of $16,997.74 for the vehicle and service application. However, unbeknownst to University, the Subaru postal wagon is not eligible for extended service protection, and, as a result, the application was subsequently rejected by Subaru Financial.

Over the next two (2) years, the Vinsons' postal wagon was serviced and/or repaired by University on numerous occasions. The primary item receiving servicing or repair was the brakes. In sum, University preformed approximately $11,000.00 of warranty work on the Vinsons' vehicle.

On May 23, 1995, the Vinsons filed a complaint against Subaru of America, Inc. d/b/a Subaru Financial Services, Inc., and University. Without specifying between the named defendants, the Vinsons' complaint alleged three separate counts: (1) the vehicle was defective at the date of manufacture and sale, and the defendants failed to exercise reasonable and ordinary care in the repair of said vehicle; (2) the defendants failed to warn the Vinsons of the vehicle's defective condition; and, (3) the defendants, jointly and severally, breached an extended service agreement.

[1] University retained $491.00 of this amount and forwarded $507.00 to Subaru to process the application.

On June 21, 1996, the Vinsons moved to amend their complaint, which motion was granted. The amendment raised three (3) additional causes of action: (1) University converted $998.00 of the Vinsons' funds to its own use; (2) University had violated the Kentucky Consumer Protection Act; and, (3) University had engaged in unfair trade practices.

The Vinsons settled with Subaru on March 19, 1996. The terms of the settlement provided that Subaru pay the Vinsons $16,997.74, representing the total purchase price of the vehicle,[2] in addition to $3,000.00 for attorney fees. A jury trial addressing the Vinsons' allegations against University commenced on May 22, 1997. University moved for a directed verdict respecting the products liability claim premised on the fact that the Vinsons had conceded mid-trial this claim pertained only to Subaru. This motion was granted. Additionally, University moved for a directed verdict on all remaining claims. After hearing arguments of counsel on these motions, the court directed a verdict in favor of University respecting the unfair trade practices, violation of the Consumer Protection Act, and the breach of warranty claims. However, the court denied University's motion with regard to the conversion and negligent repair claims, which issues were submitted to the jury on the evening of May 28, 1997.

Following deliberations, the jury returned a verdict finding in favor of University on the negligent repair claim, but

[2] We note the "total purchase price" figure was inclusive of the $998.00 paid for the extended service application.

finding that a conversion had occurred with respect to the extended service application, and awarded the Vinsons the sum of $359.28 in damages. The court entered its trial order and judgment on June 11, 1997, which, by virtue of University's February 1996 offer of judgment, supplemented the jury verdict by granting University court costs.[3]

The Vinsons first moved the court to alter, amend or vacate the judgment on July 7, 1997, on the ground that trial witness Darren McElwain (McElwain), a mechanic at University, had informed both their trial attorney and her secretary that he had not testified truthfully at trial. In September 1997, the court granted the Vinsons thirty (30) days to take McElwain's deposition, but otherwise denied all remaining motions for post-judgment relief, including a request to hold the matter in abeyance. Following the Vinsons' failed attempts to depose McElwain, they appealed the court's order denying their motion to alter, amend or vacate the trial judgment. Thereafter, the Vinsons moved the court for CR 60.02 relief, presumably on the same basis that had been propounded in the CR 59 motion.[4] This motion was likewise denied and, again, the Vinsons appealed. The two appeals were consolidated and are addressed herein.

On appeal the Vinsons argue numerous issues upon which the trial court committed reversible error, to wit: (1) the

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[3] On February 12, 1996, University filed an offer of judgment in the amount of $998.00 plus interest.

[4] The record does not contain any motion specifically seeking CR 60.02 relief. As such, we presume the Vinsons' verified motion for an order of contempt and arrest of McElwain was treated as such.

application for extended service operated as a contract; (2) three witnesses committed perjury; (3) University did not comply with pre-trial orders; (4) one juror spoke with a witness and should have been dismissed; (5) University's counsel was given unfair advantage by the court; (6) avowal witnesses' testimony was distracted by the court and opposing counsel; (7) the court permitted a witness for University to treat Vinsons' counsel disrespectfully; (8) the jury deliberation time was prejudicial to the Vinsons; and, (9) certain information was provided by the wife of a University employee. Having reviewed the record, briefs of counsel, and applicable law, we will address issues (1), (2) and (3), but decline to discuss the remaining items as such are without merit.

The Vinsons argue the court abused its discretion in granting University a directed verdict on the breach of warranty claim. In support, they contend that other postal workers had obtained extended warranties from Subaru and the terms of the contract were merely provided on the back of the application with no further documentation. As such, they propound the application evidenced a contractual agreement and the court abused its discretion in directing a verdict on this issue. We disagree.

On the motion of a defendant for a directed verdict, the trial court in the first instance, and this Court on review, are required to draw from the evidence every beneficial inference in favor of the non-movant. Baylis V. Lourdes Hosp., Inc., Ky., 805 S.W.2d 122 (1991). Similarly, the trial court is precluded from entering a directed verdict unless there is a complete

absence of proof on a material issue, or if no disputed issue of fact exists upon which reasonable minds could differ. Washington v. Goodman, Ky. App., 830 S.W.2d 398 (1992). We believe the facts conclusively support a directed verdict regarding the breach of warranty claim.

First, the Subaru Added Security Service Agreement Application provided, in pertinent part:

> RETAIN THIS FORM as evidence that you applied for the plan indicated above. This application is subject to acceptance by Subaru Financial Service, Inc. Your dealer will send a copy of this application to Subaru Financial Services who will issue and send you the Added Security agreement. IF YOU HAVE NOT RECEIVED YOUR AGREEMENT WITHIN 60 DAYS, PLEASE SEND A PHOTOCOPY OF THIS APPLICATION TO US, or call us at 800/932-0636.
>
> . . . .
>
> A brief summary of the Added Security coverage appears on the back of this application. As soon as you receive the Added Security agreement, read it carefully and familiarize yourself with all the benefits, limits of coverage, deductibles, exclusion and your responsibilities and cancellation rights. Your dealer has a sample agreement for your review.
>
> I verify the accuracy of the above information and have reviewed a copy of the application. I understand that Added Security is a service contract. It is not an insurance policy or a warranty or a guarantee.
>
> **OWNER'S SIGNATURE** /Debra Vinson

By virtue of the express language in the application, Subaru could not be contractually bound until the condition above-quoted was met, namely acceptance of the application. Therefore, Debra Vinson's signature on the application operated

as nothing more than an offer to purchase an extended service contract and as such could not be binding on either party until accepted by Subaru. See Venters v. Stewart, Ky., 261 S.W.2d 444, 445-46 (1953). As previously noted, it is undisputed that Subaru rejected the application since postal wagons are ineligible for the program. The obvious conclusion remains that no claim of breach of contract, warranty, or the like could prevail.

Secondly, even if there was a question as to whether a contract existed, which there is not, University could not be considered a party to be charged with performance of same. Rather, as the express terms of the application provide, the document called for the possible creation of a contractual arrangement between the vehicle owner and Subaru Financial Services, Inc. When the Vinsons failed to receive the Added Security agreement within 60 days of applying for same, the onus was upon them to contact Subaru with regard to the status of their application. It is unquestionable the trial court correctly directed a verdict on this issue.

Underlying both of these consolidated appeals is the Vinsons' assertion that three (3) witnesses provided perjured testimony at trial. The basis of this claim is an alleged phone conversation between witness Darren McElwain (Elwain) and Nancy Roberts (Roberts), the Vinsons' attorney. According to attorney Roberts, following the trial, McElwain communicated over the telephone that he had failed to testify truthfully regarding: (1) the number of times he worked on the Vinsons' vehicle; (2) the existence of a "team" service system over a certain period of

time; (3) whether another University employee, John Finn, unplugged a cooling fan on the Vinsons' vehicle; and, (4) whether he had actually observed Debra Vinson "ride the brakes" while driving the Subaru postal wagon. Attorney Roberts further contends McElwain suggested the testimony of two other University employees was untruthful.

As previously discussed, the trial court granted that portion of the Vinsons' motion requesting permission to depose McElwain and provided 30 days in which to do so. McElwain's deposition was never procured. On appeal, the Vinsons ask this Court to reverse the trial court for failing to assume as true the unsubtantiated allegation of tainted testimony. We decline to do so as the record is devoid of any affidavit, deposition, or otherwise sworn testimony from a witness admitting that he falsely testified at trial. See Duncil v. Greene, Ky., 424 S.W.2d 587 (1968); Benberry v. Cole, Ky., 246 S.W.2d 1020 (1952).[5]

With respect to the Vinsons' contention that the court abused its discretion in admitting or excluding certain evidence, contrary to the pre-trial orders or pursuant to pre-trial conferences, we find no merit. We are mindful that the trial court must balance the probative value of proffered evidence against its possible prejudicial effect, confusion of the issue, or creation of undue delay. Hall v. Transit Auth. of Lexington-

[5] In both these cases the Court addressed a judgment obtained by perjury where the instance of perjury was established through the affidavit of a witness admitting false testimony was provided at trial.

Fayette Urban County Gov't, Ky. App., 883 S.W.2d 884, 887 (1994). KRE 401-403. "This 'is a determination which rests largely in the discretion of the trial court . . . .'" Hall, 883 S.W.2d at 887. (Quoting Transit Auth. of River City v. Vinson, Ky. App., 703 S.W.2d 482, 484 (1985) (internal citation omitted). On appeal, the appellate tribunal will not disturb a trial court's ruling to admit or exclude evidence absent an affirmative showing that the court abused this discretion. Hall, 883 S.W.2d at 887. Having closely examined the facts, law, and arguments of counsel, we find no abuse of discretion and conclude the Vinsons have failed to meet their burden.

Additionally, with regard to the remaining issues raised on appeal, our review of the record as a whole reveals there is no merit to any of the alleged points of error. Moreover, the Vinsons proffer no legal arguments or authorities in support of their position on these points. As such, we pretermit discussion of the remaining matters on appeal.

For the reasons discussed herein, the judgment of the Warren Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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