RENDERED: August 3, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000338-MR

ERIC LLOYD KING — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LEWIS G. PAISLEY, JUDGE
ACTION NO. 97-CI-02786

ELLERSLIE CORPORATION, D/B/A
FREEDOM DODGE AND CHRYSLER
CORPORATION — APPELLEES

OPINION
AFFIRMING IN PART AND
REVERSING IN PART AND REMANDING
** ** ** ** **

BEFORE: BUCKINGHAM, COMBS, AND DYCHE, JUDGES.

BUCKINGHAM, JUDGE: Eric Lloyd King appeals from a summary judgment entered by the Fayette Circuit Court in favor of Ellerslie Corporation, d/b/a Freedom Dodge, and Chrysler Corporation. We affirm in part and reverse in part and remand.

On June 26, 1996, King purchased a used 1994 Dodge Ram pickup truck from Freedom Dodge for $22,263.00. He signed a "DEALER WARRANTY DISCLAIMER" which stated as follows:

> THE SELLING DEALER HEREBY EXPRESSLY DISCLAIMS ALL WARRANTIES, EITHER EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND NEITHER ASSUMES NOR AUTHORIZES ANY OTHER PERSON TO ASSUME FOR IT ANY LIABILITY IN CONNECTION WITH THE SALE OF THIS VEHICLE. BUYER SHALL NOT BE ENTITLED TO RECOVER FROM THE SELLING DEALER ANY

CONSEQUENTIAL DAMAGES, DAMAGES TO PROPERTY, DAMAGES FOR LOSS OF USE, LOSS OF TIME, LOSS OF PROFITS, OR INCOME, OR ANY OTHER INCIDENTAL DAMAGES.

He also paid $1,500 for a service contract. Freedom Dodge sold him the service contract, and the contract was between King and Chrysler.[1]

Approximately four months after purchasing the truck, King returned it to Freedom Dodge claiming he had discovered that the truck's frame was cracked and bent. Freedom Dodge did repair work on the truck at no cost to King, and it loaned him another vehicle for his use while the repair work was being performed. After the truck was returned to King, he continued to be dissatisfied and thereafter filed suit in the Knott Circuit Court against Freedom Dodge and Chrysler. The case was later transferred to the Fayette Circuit Court on Freedom Dodge's motion. Freedom Dodge successfully moved the court to grant it summary judgment, and this appeal followed the trial court's denial of King's motion to reconsider.[2]

King argues on appeal that the trial court erred in awarding Freedom Dodge summary judgment because fact issues existed concerning Freedom Dodge's violation of KRS[3] 186A.540,

[1] We have searched the record and have been unable to locate the service contract. While it is not in the record, the parties apparently agree that the contract was for a period of two years or 24,000 miles, whichever occurs first. The application for the service contract is in the record.

[2] Chrysler has since been dismissed as a party.

[3] Kentucky Revised Statutes.

the Kentucky Consumer Protection Act (KRS 367.110-.360)[4], KRS 355.2-314, and the Magnuson-Moss Warranty Act. In granting summary judgment to Freedom Dodge, the trial court held in pertinent part as follows:

> The Court finds that when the facts are taken in a light most favorable to the Plaintiff, it appears to be impossible that the Plaintiff could succeed at trial. The Court finds that there are no genuine issues of material fact. The Plaintiff signed a Dealer Warranty Disclaimer at the time of sale. There is no evidence that the Dealer's agents committed fraud or misrepresentation. In fact, the only representation made by the Dealer's agent was that the truck was four wheel drive. Because the Dealer Warranty Disclaimer was valid and enforceable, and because there is no evidence of fraud or misrepresentation, it is irrelevant whether or not the truck's frame was cracked, bent, and/or broken at the time of sale. The Court rejects the Plaintiff's argument concerning the Magnuson Moss Warranty Act, 15 USC 2301-12. The Magnuson Moss Act involves situations in which the "supplier" disclaims a warranty and also enters into a service contract with the consumer. The Act is not applicable to the facts of this case. The Dealer Warranty Disclaimer was an agreement between Freedom Dodge (the "supplier") and the Plaintiff. The Service Contract was an agreement between Daimler Chrysler Corporation and the Plaintiff. Since the same party did not both disclaim the warranty and enter into the service contract, the Act does not apply.

We will examine King's four separate arguments individually.

King's first argument is that Freedom Dodge violated the provisions of KRS 186A.540 which provides:

> An individual or a dealer required to be licensed pursuant to KRS Chapter 190 shall

[4] All references in this opinion to the Kentucky Consumer Protection Act will be to those statutes which were in effect during the time King's claim arose and his suit was filed.

> disclose all damages to a motor vehicle which result in repairs or repair estimates that exceed three hundred dollars ($300) and that occur while the motor vehicle is in his possession and prior to delivery to a purchaser. Disclosure shall be in writing and shall require the purchaser's signature acknowledging the disclosure of damages.[5]

A violation of KRS 186A.540 is a Class A misdemeanor. KRS 186A.990(6). The statute does not provide for a civil cause of action for its violation. Although King does not so state in his brief, we assume he maintains that a violation of the statute constitutes grounds for a civil action in fraud.

King argues that Freedom Dodge did repairs to the truck in the amount of $784 while it was in its possession prior to selling it to him. While he does not allege that these damages related to any problem with the frame, he nonetheless asserts that Freedom Dodge violated the statute by failing to disclose these repairs to him. On the other hand, Freedom Dodge argues that the undisputed evidence is that the repair work was "reconditioning and sales prep work" which need not be disclosed as damages under the statute.[6]

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[5] This statute was amended effective February 22, 2000, to provide for disclosures when the repairs or repair estimates exceed $1,000.

[6] Daryl Ayers stated in an affidavit that the work done by Freedom Dodge on the truck "consisted of applying new decals, touch up paint work, buffing and restoring small dings and paint scratches." He also stated in the affidavit that the work done by Freedom Dodge on the truck "did not consist of repairs to damage to said pick-up truck which occurred while in the possession of Freedom Dodge." The statements in the affidavit were not refuted by any affirmative evidence on King's behalf. See Kentucky Rules of Civil Procedure (CR) 56.03 and Gevedon v. Grigsby, Ky., 303 S.W.2d 282, 284 (1957).

We have several problems with King's argument on this issue. First, King made no mention in his complaint that he was asserting a cause of action for Freedom Dodge's failure to disclose the damages in excess of $300 to him. In paragraph eleven of his complaint, he alleged as follows:

> That on or about June 26, 1996, the date of purchase, Plaintiff asked the sales agent of Defendant to provide him information on the history of the vehicle. The sales agent stated that the vehicle was a one owner and had not been wrecked. Defendant's sales agent failed to disclose the fact that the vehicle had been salvaged, in violation of KRS 186 A 450.

King does not assert a cause of action in the complaint related to Freedom Dodge's failure to disclose damages in excess of $300. Furthermore, in response to Freedom Dodge's summary judgment motion, King did not make this argument. He apparently raised it for the first time in his motion to the trial court to reconsider the summary judgment it had entered.[7]

We also reject King's argument because the undisputed evidence was that the $784 spent in repair work on the truck was for general reconditioning and sales prep work and not for damages contemplated by the statute.[8] More importantly, we note

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[7] The trial court addressed King's argument by stating that "there is no evidence that the truck had been salvaged; therefore, the sales agent could not have failed to disclose the fact."

[8] We acknowledge that this court in Smith v. General Motors Corp., Ky. App., 979 S.W.2d 127 (1998), stated that the statute "should be broadly interpreted to include any motor vehicle repairs over $300.00, be they mechanical, body, or otherwise." Id. at 130. In that case, the court held that the term "damages" as used in the statute included problems with the radiator and engine as well as body damages. Citing KRS

(continued...)

that since no evidence was presented to show that the $784 in repairs related to the bent and cracked frame, then King has not demonstrated how a violation of the statute was the proximate cause of any damages to him that might have resulted.[9]

King's second argument is that there were fact issues concerning his allegation that Freedom Dodge violated the Kentucky Consumer Protection Act and that the trial court erred in granting summary judgment for this reason. KRS 367.170 provides as follows: "(1) Unfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful. (2) For the purposes of this section, unfair shall be construed to mean unconscionable." In rejecting King's argument, the trial court held that "[i]t is clear from the evidence that the only representation made by the sales agent was that the truck was four-wheel drive. This statement was in response to the Plaintiff's question. There is no evidence in the record that the Defendant did anything that was unfair, misleading, or deceptive." Because Freedom Dodge sold the truck with a "DEALER WARRANTY DISCLAIMER" which stated that the truck was being sold "as is" and "with all faults" and

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[8](...continued)
186A.500, the court noted that the legislative purpose was to enable purchasers to know of "prior severe damage." We do not believe that general reconditioning and sales prep work are the sort of damages which the statute contemplates must be disclosed.

[9] In Peak v. Barlow Homes, Inc., Ky. App., 765 S.W.2d 577 (1988), this court held that "in an action for damages, the violation of the statute must be the proximate cause of the injury to permit recovery." Id. at 578. Although that case involved a negligence action, we believe the principle therein is applicable to this case.

because there is no proof that Freedom Dodge knew that the frame was bent and cracked, we agree with the trial court that there is no evidence that Freedom Dodge engaged in any unfair, false, misleading, or deceptive acts or practices. Thus, summary judgment on King's claim under the Kentucky Consumer Protection Act was appropriate.

King's third argument is that there were fact issues concerning his allegation that Freedom Dodge breached an implied warranty of merchantability under KRS 355.2-314 and that the trial court erred in granting summary judgment for that reason. However, KRS 355.2-316 allows for the exclusion or modification of warranties. The warranty disclaimer given by Freedom Dodge to King appears on its face to be valid, and we conclude that the disclaimer would have validly disclaimed all warranties had it not been for the applicability of the Magnuson-Moss Warranty Act as we discuss below.

King's final argument is that there were fact issues concerning his allegation that Freedom Dodge violated the Magnuson-Moss Warranty Act and that the trial court erred in granting summary judgment on this claim. The applicable portions of the act state as follows:

> Restrictions on disclaimers or modifications. No supplier may disclaim or modify (except as provided in subsection (b)) any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.

> . . . .
>
> Effectiveness of disclaimers, modifications, or limitations. A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this title [15 USCS § 2304(a)] and State law.

15 USCS § 2308(a) and (c). King's argument is that because Freedom Dodge sold him a service contract within 90 days of his purchase of the truck, then the warranty disclaimer is ineffective under the terms of the statute. He thus asserts that the implied warranty of merchantability under KRS 355.2-314 was not effectively disclaimed by Freedom Dodge and that he is entitled to damages for Freedom Dodge's breach of that warranty. The trial court rejected that argument and held that Freedom Dodge did not enter into the service contract. Rather, the court held that the service contract was between King and Chrysler and thus the Magnuson-Moss Warranty Act was not applicable.

The service contract application signed by King and by Freedom Dodge contains a "DEALER INFORMATION" section that provides: "(4) YOU WILL PROVIDE SERVICE TO THE PURCHASER IN ACCORDANCE WITH THE PROVISIONS OF THE SERVICE CONTRACT CHRYSLER WILL ISSUE TO THE PURCHASER, (5) YOU HAVE REVIEWED THE CHRYSLER SERVICE CONTRACTS GUIDE AND AGREE TO ABIDE BY THE POLICIES AND PROCEDURES SPECIFIED THEREIN." This section of the application was signed by a representative of Freedom Dodge. In other words, Freedom Dodge agreed to do any service work under the service contract.

The Tennessee Court of Appeals addressed a similar situation in Patton v. McHone, 822 S.W.2d 608 (Tenn. 1991). In

that case, Patton, the purchaser of a used car, filed suit against Harpeth Toyota, the car dealership that sold him the car, after discovering that the car had a cracked engine block and a bent frame and that the timing chain had broken. Patton alleged fraud, breach of implied warranty of merchantability, violations of the Tennessee Consumer Protection Act, and violations of the Magnuson-Moss Warranty Act. The court therein stated as follows:

> That Harpeth Toyota was acting as an agent for an extended warranty company when it sold the service contract to the Pattons is of no significance insofar as 15 U.S.C. § 2308(a) is concerned. The service contract required the Pattons to obtain their service from Harpeth Toyota unless they obtained special permission to go elsewhere. There is no indication in the language or legislative history of the Magnuson-Moss Act that the service contract must originate with or be the sole responsibility of the dealer.

Id. at 617. We agree with the reasoning of the Patton case and hold that the Magnuson-Moss Warranty Act is applicable in that Freedom Dodge entered into a service contract with King. Therefore, the warranty disclaimer is ineffective, and King may pursue his claim against Freedom Dodge for breach of implied warranty of merchantability.

The judgment of the Fayette Circuit Court is affirmed in part and reversed in part and remanded.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Sam H. Whitehead
Lexington, Kentucky

BRIEF FOR APPELLEE FREEDOM DODGE:

M. Scott Mattmiller
C. Timothy Cone
Lexington, Kentucky