RENDERED: NOVEMBER 18, 2005; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001883-MR

CRAIG & BISHOP, INC., D/B/A
SONNY BISHOP CARS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 03-CI-007221

CHRISTY PILES, CHARLES WARNER,
And HONORABLE ELLEN G. FRIEDMAN — APPELLEES

OPINION
AFFIRMING IN PART
AND
VACATING IN PART
** ** ** ** **

BEFORE: KNOPF AND TACKETT, JUDGES; ROSENBLUM, SENIOR JUDGE.[1]

ROSENBLUM, SENIOR JUDGE: The Appellees, Charles Warner and Christy Piles, filed this action for fraud, conversion, and violation of the Kentucky Consumer Protection Act after they attempted to purchase an automobile from the Appellant, Craig and Bishop, Inc. D/B/A/ Sonny Bishop Car (hereinafter Sonny).

[1] Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

A judgment was entered following a jury verdict awarding Warner and Piles $8,600 in compensatory damages and $50,000 in punitive damages.

On June 30, 2003, nineteen-year-old Warner saw an advertisement for a 1997 Mustang for sale for $4,950 at Sonny's and immediately called to see if it was available. He was told it was so he and his girlfriend, Piles, went to the dealer's lot. At that time, Warner and Piles were told the Mustang had been sold. A sales representative, Glenn Summitt, showed the couple a 2000 Camero with a cost of over $14,000. Warner liked the Camero, but concerned about the price, inquired about financing. The only down payment Warner could make was in the form of his 1997 Nissan, which Summitt told him, had a trade-in value of $1,000. The remaining amount, $13,983.50, would have to be financed.

It is the nature and availability of the proposed financing that is at the center of this controversy. Warner and Piles testified that they told Summitt they could not afford more than a $250 per month payment and, would pay no more than 8% interest to which Summitt responded, "I Guarantee you I can get you in that car if you like it." Warner and Piles were told, however, that Summitt was not authorized to do the financing and that the General Manager, Pam Bishop Ferguson, was the only one who could approve financing. Ferguson was called

at home and she determined that Warner had insufficient credit and the loan would have to be in Piles' name.

That same evening, without any financing approval, Piles signed various documents including a "Vehicle Purchase Agreement", an "Affidavit of Spot Delivery Agreement", and a blank Retail Installment Contract. Warner signed the title to the Nissan in blank. The Vehicle Purchase Agreement stated that the sale of the vehicle was on a cash basis and that no oral promises or representations were made that were not incorporated into the agreement. The "Affidavit of Spot Delivery" acknowledged that Piles understood that she was taking possession of the vehicle prior to obtaining financing and that she agreed to its purchase. It also stated:

> "I understand that if the transferor is unable to obtain credit approval on my loan within three (3) business days, and if I am unable to obtain financing of my own within 24 hours after notification from transferor that loan has been denied, I will be required to return the vehicle to the transferor. . . ."

Warner and Piles departed the dealership with the Camero and left behind the Nissan.

During the following two days, Ferguson's attempts to secure financing for the full amount owed on the Camero failed. She informed Warner and Piles that they would either have to make an additional $3,000 down payment or return the Camero.

After several discussions, Sonny offered to sell the Camero for $3,000 less than the original price so that it could be financed. Warner and Piles rejected the offer and were told the Camero would have to be returned.

On July 6, 2003, Piles and Warner returned to the dealership with the Camero but were told that the keys to the Nissan were not at the dealership. A heated argument ensued ending when a sales representative offered to drive the Nissan to Piles' office the next day if they would leave the premises; the following day, however, Piles was told that she would have to pickup the Nissan herself. Piles was unable to leave work, so Warner went to the dealership where he was told the Nissan had been sold. Sales Manager Don Raley allegedly told Warner that he could either bring him $14,000 by 5:00 p.m. or the Camero would be repossessed. On July 14, 2003, Warner and Piles returned the Camero to the dealership. Raley then notified them that the Camero was considered repossessed and would be sold at auction. This action followed.

Warner and Piles based their claims for relief on the Kentucky Consumer Protection Act, fraud, conversion, breach of implied good faith, and the tort of outrage. Sonny counterclaimed alleging that Piles breached the purchase agreement. Only the first three causes of action and Sonny's counterclaim were ultimately submitted to the jury.

The jury found that there was no contract between the parties but found that Sonny's actions were fraudulent, it violated the Consumer Protection Act, and converted Warner's automobile. Damages for the conversion of the Nissan were awarded based on the fair market value of the automobile, $2,000. Sonny does not challenge this part of the jury's verdict. It does challenge the findings that it violated the Consumer Protection Act, committed fraud, and the award of damages. Specifically, for violation of the Consumer Protection Act or fraud, the jury awarded $2,100 for the loss of use of the Nissan between July 14, 2003 and January 17, 2004, and for the "inconvenience" of Warner, $3,000 and for the "inconvenience" of Piles, $1,500. Warner and Piles were also awarded $50,000 in punitive damages.

Sonny objected to any testimony concerning its promise or guarantee of any specific interest rate, payment, or length of the loan, and expert testimony concerning "usage of trade". It contends that the alleged oral statements contradict the written terms of the Vehicle Purchase Agreement and the Affidavit of Spot delivery and are, therefore, inadmissible. Parol evidence is not admissible to modify or change the express terms of an unambiguous written document. Johnson v. Dalton, 318 S.w.2d 415, 417 (Ky. 1958). Here, the documents are ambiguous both as to the payment terms, cash or loan, and the

finality of the sale; the parol evidence rule, therefore, does not bar the admission of extrinsic evidence.

Sonny is also erroneous in its characterization of the action as one arising out of contract. Warner and Piles sought damages for fraud, violation of the Consumer Protection Act, and conversion. There are recognized exceptions to the parol evidence rule and extrinsic evidence is generally admissible to prove "illegality, fraud, duress, mistake and failure of consideration. Id. The law provides that even though a misrepresentation relates to matters covered in a written contract that by its terms excludes any oral representations, parol evidence is admissible to show that the contract was procured by fraudulent representations. Bryant v. Troutman, 287 S.W.2d 918, 920 (Ky. 1956). Likewise, although no Kentucky case has addressed the issue, we believe the same reasoning is applicable to claims brought pursuant to the Consumer Protection Act and that parol evidence is admissible to establish that the sale was procured by misrepresentations, deceitful practices, or unfair means.

By written request, a juror asked that Sonny Bishop be questioned concerning any legal requirement that financing terms be disclosed, and if so, the time for disclosure. The court submitted the question to Bishop who responded, "No". The following day, the court, over Sonny's objection, read a portion

of the Truth-In-Lending Act that requires disclosure of the loan terms prior to execution of a "retail installment contract." Assuming some error when the court read a portion of the Act to the jury, it was harmless. There was no finding that the Act was violated and Sonny contends that it was a cash sale so that Bishop's response was accurate.

The circuit court denied Sonny's motion for a directed verdict on the issue of common law fraud and the Consumer Protection Act. A review of a denial of a directed verdict requires that we apply the following standard:

> All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine the credibility or the weight which should be given the evidence, these functions reserved to the trier of fact. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence.

Stringer v. Wal-Mart Stores, Inc., 151 S.W.3d 781, 787 (Ky. 2004). Even assuming the facts as stated by Warren and Piles to be true, their fraud claim must fail and the circuit court erroneously submitted the issue to the jury. To establish fraud, the plaintiff must prove the following elements by clear and convincing evidence: "a) material misrepresentation b) which is false c) known to be false or made recklessly d) made with inducement to be acted upon e) acted in reliance thereon and f) causing injury." United Parcel Service Co. v. Rickert, 996

S.W.2d 464, 468 (Ky. 1999). The statement must be as to an existing or past fact.

> Actionable misrepresentation must relate to a past or present material fact which is likely to affect the conduct of a reasonable man and be an inducement of the contract. A mere statement of opinion or prediction may not be the basis of an action. The representation must be short of a warranty but sufficient to deceive and to create in the mind a distinct representation of a fact.

McHargue v. Fayette Coal & Feed Company, 283 S.W.2d 170, 172 (Ky. 1955).

In Rivermont Inn v. Bass Hotels, Inc., & Resorts Inc., 113 S.W.3d 636 (Ky.App. 2003), Rivermont entered into negotiations with Holiday Inn to purchase a franchiser license to operate an existing hotel as a Holiday Inn. Three days prior to the closing of the hotel property, Rivermont contacted the vice president for franchise administration for Holiday and was assured that the licensing would be forthcoming and to close on the property. For reasons not relevant to this discussion, the franchise license was not approved and Rivermont filed an action for fraud. The circuit court found, and this court agreed, that summary judgment in favor of Holiday was warranted because the statement as to the success of obtaining the license was a "prediction, and not a statement of present or past material fact." Id. at 640.

The alleged promise made by Summitt as to the loan and interest rate is not a statement as to a past or existing fact. Warner and Piles knew that Summitt did not have authority to approve the final financing, that the issue of financing was unsettled at the time the documents were signed, and when they took possession of the Camero. Under the circumstances, it is impossible for a reasonable jury to conclude other than that Summitt's statement was as to a future fact. A statement that a dealer can obtain financing for a buyer is nothing more than a statement as to what will happen in the future. The statement can not serve as the basis for actionable common law fraud; the trial court erred, therefore, when it denied Sonny's motion for a directed verdict on the fraud claim.

Our holding that the issue of fraud was erroneously submitted to the jury does not necessarily require that the jury's damage award be vacated. The wording of the instructions submitted permitted the jury to award damages for inconvenience and loss of use if it found the Sonny's acts were fraudulent or if it violated the Consumer Protection Act. Punitive damages were permitted on the finding that Sonny's acts were fraudulent, or it violated the Act, or it converted the Nissan. There is no issue raised on appeal concerning the form of the instructions. The jury found in favor of Warner and Piles on all three claims; thus, the damages awarded will stand if the claims other than

that for fraud are supported by the evidence and if the damages are otherwise legally permissible.

Sonny contends that Warner and Piles were not "consumers" and thus do not fall within the class intended to be protected by the Consumer Protection Act. It relies on Skilcraft Sheetmetal Inc., v. Kentucky Machinery, 836 S.W.2d 907 (Ky.App. 1992), where this court held that a seller cannot be liable to a third party when there is no privity of contract. However, the facts of this case are not comparable. Although the jury found that there was no enforceable contract between the parties and there was no actual purchase of the vehicle, the parties negotiated the purchase of the vehicle as buyers and seller. To deny Warner and Piles a remedy simply because the jury found that there was no enforceable contract would frustrate the Act's purpose to afford the consuming public protection against unscrupulous business practices. See Stafford v. Cross County Bank, 262 F.Supp.2d 776, 793 (W.D.Ky. 2003). Warner and Piles, who negotiated with Sonny, signed purchase and sale documents, and left the Nissan as a down payment on the Camero were consumers.

A consumer can maintain a private action if the individual "purchases or leases goods or services primarily for personal, family, or household purposes and thereby suffers any ascertainable loss of money or property . . . ." KRS 367.220(1).

The elements required for a private cause of action under the Act have not been specifically delineated in a single Kentucky case. However, it is the purpose of the Act to provide the consumer with broader protection than is available under the traditional common law remedies. Skilcraft, supra. KRS 367.170(1) provides that "[u]nfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." "Unfair" is further defined in subsection (2) as "unconscionable". Although the remaining terms are left largely undefined, Kentucky courts have applied an objective standard and defined the acts or conduct prohibited as the terms are generally understood and perceived by the public. Smith v. General Motors Corporation, 979 S.W.2d 127, 131, (Ky.App. 1998). While fraud can support an action, it is clear from the language used that fraud is not the only act or conduct that the legislature deemed unlawful. The Act prohibits any act or conduct that is unfair, deceptive, or misleading.

Although Kentucky courts have not written on the issue, other jurisdictions have distinguished a cause of action under its Consumer Protection Acts from common law fraud. In Duran v. Leslie Oldsmobile, 229 Ill.App.3d 1032, 171 Ill.Dec. 835, 594 N.E.2d. 1355, (Ill. 1992), the court considered whether a car dealer's statement as to a future interest rate on a car

loan was actionable. It concluded affirmatively, holding that to establish a claim for fraud under the its Consumer Fraud Act, the plaintiff must allege: "(1) a statement by the seller; (2) of an existing or future material fact; (3) that was untrue, without regard to the defendant's knowledge or lack thereof of such untruth; (4) made for the purpose or inducing reliance; (5) on which the victim relied; and (6) which resulted in damage to the victim." Id. at 229 Ill.App.3d at 1041, 171 Ill.Dec. at 842, 594 N.E.2d at 1362. In Munters Corp. v. Swissco-Young Industries, Inc., 100 S.W.3d 292 (Tex. 2002), the Texas court held that statements as to future events or conduct are actionable under that state's Deceptive Trade Practices Act. The court held that when examining the basis for such a claim, the courts must distinguish between mere "puffing" which is a general statement of opinion and not actionable, and a specific misrepresentation as to a future event or condition that is actionable.

We agree with our sister states that misrepresentations under Consumer Protection Acts may be either to a past, present, or future fact. Were we to construe the protection given the equivalent of that provided by common law, the legislature's clear intent to provide broader protection to consumers would be negated. Deceitful practices and misrepresentations of future or existing facts are actionable if

done for the purpose of inducing the reasonable consumer to purchase the seller's goods or services for household use and, as a result, the consumer suffers damage.

Warner and Piles were a young couple with obvious minimal financial resources who went to the dealership to look at a car advertised for a price of $4,950 and drove from the lot in a car valued at $14,000. It is clear from the testimony of Warner and Piles that the single significant factor in the decision to purchase the Camero was the statement by Summit that they could obtain the desired financing. Otherwise, it was simply beyond their financial ability to pay for the car. There is no doubt that the terms of the financing was a material factor in the decision to purchase the Camero, that Sonny's employees knew that that Warner and Piles could not purchase the Camero with payments that exceeded $250 per month, and that the documents were signed with the assurance that the desired financing would be obtained.

Although we believe the statement as to financing would be a sufficient misrepresentation to support a claim under the Act, it alone would not support a damage award. Once it was determined that financing could not be obtained, if Sonny would have merely returned the Nissan and Warner and Piles the Camero, there would have been no damage caused by the misrepresentation

and no claim under the Act. KRS 367.220(1). However, the actual scenario was quite different.

In accordance with the terms of the "Affidavit of Spot Delivery", after it was apparent that financing was not possible at the desired rate, Warner and Piles sought to return the Camero to Sonny and retrieve the Nissan; their attempts were, however, frustrated by Sonny's failure to disclose the Nissan's sale. Despite the fact that the Nissan had been sold, Sonny lied about the Nissan's location, attempted to "bully" Warner and Piles into purchasing the Camero, and ultimately threatened them with a repossession of the Camero.

There is sufficient evidence that Warner and Piles suffered damage as a result of Sonny's action when it lied about the sale of the Nissan and its conversion. In addition to the value of the Nissan, Warner was deprived of its use and Piles testified that because of Sonny's attempts to avoid the return of a car of which it no longer had possession, she was forced to miss work. Although the actual damages are slight, there was sufficient evidence to find that both Warner and Piles sustained a loss as a result of Sonny's violations of the Act.

The final issues raised concern the damages awarded. On the conversion claim, the jury awarded $2,100 for loss of use of the Nissan and $3,000 to Warner and $1,500 to Piles for "inconvenience". We agree with Sonny that the $2,100 award for

loss of use and the $4,500 award for "inconvenience" are impermissible duplications of damages. The inconvenience caused by Sonny's unlawful actions arose from the loss of use of the car. The damage award for inconvenience is vacated.

Finally, punitive damages were awarded in the amount of $50,000. The Consumer Protection Act, KRS 367.220(1) provides:

> Nothing in this subsection shall be construed to limit a person's right to seek punitive damages where appropriate.

This provision does not expand the right to claim punitive damages but does not limit the right to punitive damages where one previously existed. Ford Motor Company v. Mayes, 575 S.W.2d 480, 487 (Ky.App. 1978). In Hensley v. Paul Miller Ford Inc., 508 S.W.2d 759 (Ky. 1974), the plaintiff sought compensatory and punitive damages against a car dealer for trover and conversion after it sold the plaintiff's automobile without obtaining legal title and in disregard of the understanding that it would not be sold until the plaintiff obtained financing for the purchase of the dealer's automobile. The court held that although the dealer did not intend to harm the plaintiff, punitive damages were warranted if the defendant's gross negligence or his recklessness caused injury. Id. at 762; See also Motors Ins. Corp. v. Singleton, 677 S.W.2d 309 (Ky.App. 1984).

The jury in this case was instructed that punitive damages could be awarded if Sonny acted "intentionally, with fraud, oppression or with reckless indifference to their rights." We find no error in the instruction. In 1988, KRS 411.184 was enacted and provides that punitive damages can be awarded if the defendant acted with oppression, fraud, or malice. In Farmland Mutual Ins. Co. v. Johnson, 36 S.W.3d 368, 382 (Ky. 2000), the court rejected the argument that the statute requires that an instruction precisely mirror its language and upheld an instruction permitting punitive damages upon a finding that the insurance company acted knowingly or recklessly. As in Farmland Mutual Ins. Co., we find no reversible error in the inclusion of the term "reckless indifference".

We have no difficulty agreeing with jury that Warner and Piles are entitled to punitive damages. It was reasonable for the jury to conclude that the entire transaction between the parties was fraught with deception from the moment Warner and Piles were lured into the potential purchase of an automobile priced almost three times that in which they were originally interested. The award, however, was more than twelve times the amount of the permissible compensatory damages, an amount Sonny contends was excessive. Disproportion of the punitive damage award to the compensatory award is not necessarily a factor to be considered. Hensley, supra, at 763. The purpose of such an

award is, as its name implies, to punish the civil wrongdoer and to act as a deterrent to the same conduct in the future. "A reasonable ratio in one instance may frustrate this purpose if a plaintiff's compensatory damages are particularly small." Phelps v. Louisville Water Company, 103 S.W.3d 46, 55 (Ky. 2003). Nevertheless, the award must bear some relationship to the injury and its cause. Hensley, supra. In reviewing a punitive damage award, the court must also examine the civil or criminal penalties imposed for comparable misconduct. Phelps, supra, at 55. Finally, the appellate court, in its final analysis, must always defer to the trial court. Id. at 54.

In reviewing the evidence as whole, with some hesitation, we affirm the amount of punitive damages awarded. The compensatory damages were relatively small, yet the business dealings between car dealers and the public are of sufficient public interest that unlawful and tortuous acts must be deterred. Although the harm caused was small, it was caused by Sonny's deliberate and deceitful acts. Finally, in Hensley, the court affirmed a finding of the trial court that the $20,000 punitive damages award was excessive where only $2,103.85 was awarded for compensatory damages. However, the court pointed out that its decision was based on a finding that the trial court did not abuse its discretion rather than upon its own finding that the verdict was excessive. Id. at 764. We are also bound

to defer to the trial court's discretion and, in this case, affirm its finding that the punitive damage award was not excessive.

The judgment is affirmed in all respects except that the jury's verdict as to fraud and the awards for "inconvenience" to Warner and Piles are vacated.

ALL CONCUR.

BRIEF FOR APPELLANT:

Fred E. Fischer
Joseph Michael Kelly
Louisville, Kentucky

BRIEF FOR APPELLEES:

Ellen G. Friedman
Louisville, Kentucky