

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001564-MR

JOHN KEETON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 03-CI-03032

LEXINGTON TRUCK SALES, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, LAMBERT, AND STUMBO, JUDGES.

CLAYTON, JUDGE: John Keeton appeals from the Fayette Circuit Court's July 26, 2011 judgment, which followed a jury verdict and held in favor of Lexington Truck Sales, Inc. Further, he appeals from the circuit court's denial of his motion for a new trial. The matter involves a dispute concerning the sale of a truck.

Having carefully considered the record and the parties' respective arguments, we affirm the trial court's decisions.

FACTUAL AND PROCEDURAL BACKGROUND

Keeton, a commercial trucker, purchased a used commercial Volvo truck from Lexington Truck Sales, Inc. (hereinafter "LTS") on May 28, 2002. When Keeton purchased the truck, he knew that it was a used truck with high mileage. Keeton, however, alleges that LTS did not inform him about repairs performed by them prior to his purchase of the truck. In addition, he claims that one of these problematic repairs was an odometer rollback.

In the months following the purchase of the truck, Keeton and his employees drove the truck approximately 83,000 miles, pulling heavy loads. The truck required repairs on several occasions. Eventually, in March 2003, the truck experienced, what Keeton described as, a "blown engine." Rather than send the damaged truck to LTS, Keeton sent it to Kentucky Truck Sales in Jeffersonville, Indiana. According to Keeton, the truck was diagnosed with either a broken piston or broken rod, and the engine was ruined. At no time did Keeton return the truck to LTS.

Keeton filed the original lawsuit in April 2003. In his complaint and amended complaint, he alleged that LTS's action in selling the truck breached a warranty, violated the federal Magnuson-Moss Warranty Act, the Consumer Protection Act, and Kentucky Revised Statutes (KRS) 186A.540, plus he made a claim of fraud, which was supported by one sentence. The odometer rollback and

its related statute, KRS 190.270, were mentioned in the sentence concerning the alleged fraud. The suggested damages sought in the complaint were to be measured by the difference in the value of the truck as warranted and as delivered plus incidental and consequential damages. After some discovery, LTS moved for summary judgment on all claims. The trial court granted the motion for summary judgment, and Keeton appealed the decision to the Court of Appeals.

In that appeal, Keeton made five arguments - that there was a violation of KRS 186.540, that LTS violated KRS 190.270 by rolling back or resetting the odometer, that LTS committed fraud, that LTS violated the Consumer Protection Act, and lastly, that there had been a breach of warranty and a violation of the Magnuson-Moss Warranty Act. Our Court decided in *Keeton v. Lexington Truck Sales*, 275 S.W.3d 723 (Ky. App. 2008), that the trial court's grant of summary judgment was proper on all claims except for the claimed violation of KRS 186A.540. The Court decided that KRS 186A.540 imposes a mandatory requirement on a dealer to disclose repairs over \$1,000 so that a purchaser of a vehicle has knowledge whether the vehicle has previously sustained severe damage. The Court concluded that since the cumulative amount of the repairs performed by LTS exceeded \$1,000, this issue was appropriate for a jury decision. In doing so, the Court stated "[w]hether Keeton can establish that LTS[']s violation of KRS 186A.540 resulted in damages in this particular case is a question left to the fact-finder." *Id.* at 728.

Upon remand, the trial court set the matter for trial, which included a June 30, 2011 deadline to amend the pleadings. Before the deadline passed, Keeton moved the court to amend his complaint to assert a claim against LTS for a violation of KRS 190.270(2), which prohibits a party from disconnecting, resetting, or altering an odometer for the purpose of changing the number of miles on the odometer. The trial court denied this motion.

Because Keeton continued to raise the issue of the odometer rollback, LTS made a motion in limine to exclude testimony about the matter. After briefing and argument, the trial court granted the motion in limine, which prohibited Keeton from putting forth evidence about the rollback of the odometer. In his appeal, Keeton claims that this information is necessary to establish damages from LTS's violation of KRS 186A.540. Keeton, however, does not appeal from the order that granted the motion in limine.

Both parties filed proposed jury instructions. While LTS submits that both parties' jury instructions were substantively identical with regard to the violation of KRS 186A.540, Keeton contends that the jury instructions provided by the trial court are in contravention to the Court of Appeals' earlier decision. He argues that the trial court's instructions required the jury to determine whether LTS breached its duty to Keeton when our Court had already determined that LTS was negligent per se.

A jury trial was held on July 7, 2011. Following the dictates of *Keeton*, the sole issue was whether KRS 186A.540 was violated and, if so, whether

any damages resulted. Keeton presented evidence that LTS made no disclosure to him about previous repairs. Yet, LTS maintained that he failed to prove the damages resulted from the previous undisclosed repairs, and thus, did not establish causation. The disclosed repairs included minor body work and an air conditioner repair, which are, according to LTS, unrelated to the engine problem in question. The jury found in favor of LTS. On July 26, 2011, the trial court entered a judgment in favor of LTS in accordance with the jury verdict. Keeton moved for a new trial, which the trial court denied. He now appeals from the judgment and the denial of the motion for a new trial.

On appeal, Keeton argues that the jury instructions were improper under the law of the case doctrine; that the jury instructions were unclear, ambiguous, and open to interpretation; that relevant evidence about the odometer rollback was improperly ruled inadmissible; and, that he should have been able to amend his complaint. LTS responds that the jury instructions were proper and that Keeton waived his objection to them; that the trial court properly denied admission of any evidence about the odometer rollback; and, that the trial court properly denied Keeton's motion to amend the complaint. We address each issue individually.

ANALYSIS

1. Jury Instructions

Because alleged errors regarding jury instructions are considered questions of law, we examine them under a de novo standard of review. *Reece v.*

Dixie Warehouse and Cartage Co., 188 S.W.3d 440, 449 (Ky. App. 2006). The issue on appeal regarding an alleged erroneous jury instruction is whether the instruction misstated the law. *Olface, Inc. v. Wilkey*, 173 S.W.3d 226, 229 (Ky. 2005).

Keeton contends the jury instructions were unsuitable since they violated the law of the case doctrine. He maintains that in its earlier decision our Court ruled that LTS's violation of KRS 186A.540 constituted negligence per se, and therefore, whether LTS breached its duty was no longer a question to be presented to the jury.

The questionable jury instructions were as follows:

Instruction No. 1

It was the duty of the Defendant, Lexington Truck Sales, Inc. to disclose all damages to the Volvo truck in question which resulted in repairs or a repair estimate that exceeded One Thousand dollars (\$1,000.00) and that occurred while the Volvo truck in question was in the possession of the Defendant prior to delivery to the Plaintiff, John Keeton. Disclosure shall be in writing and shall require the plaintiff's signature acknowledging the disclosure of the damages.

Question No. 1

Are you satisfied from the evidence that the Defendant, Lexington Truck Sales, Inc. violated the foregoing duty and that the Plaintiff, John Keeton, suffered damages as a direct result of such a violation?

In the instant case, we are not persuaded by Keeton's argument regarding the inefficacy of the jury instructions.

First, we observe that the law-of-the-case doctrine is a tenet under which an appellate court, on a subsequent appeal, is bound by a prior decision on a former appeal in the same court. The determination of questions of law and not questions of fact is at issue. It is explained in *Inman v. Inman*, 648 S.W.2d 847, 849 (Ky. 1982):

it designates the principle that if an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case.

Our Court in the earlier case decided that Keeton is entitled to assert a right of action for negligence under KRS 186A.540. As noted by the Court, KRS 446.070 converts the standard of care required by the violated statute into a statutory standard of care for the negligence, that is, negligence per se. *Keeton*, 275 S.W.3d at 728. But, notwithstanding the statutory duty of care, the Court of Appeals still determined that Keeton must establish for the fact-finder that LTS's violation of KRS 186A.540 caused the damages. *Id.*

Our discernment of the jury instructions illustrates no violation of the law-of-the-case doctrine. Instruction No. 1 is basically a recitation of KRS 186A.540. Question 1 implicates the issue of causation when it says "that the Plaintiff, John Keeton, suffered damages as a direct result of such a violation?" Thus, the jury instructions reflect the directive of the Court of Appeals' first

decision in this matter – they recite the requisites of the applicable statute and ask whether LTS’s actions caused the damages for which Keeton requests recompense.

Keeton also complains that the jury instructions are unclear, ambiguous, and open to various interpretations. While the separate recitation of duty in Instruction 1, coupled with the use of duty and causation in Question 1, may have been inartful, we conclude that it is unambiguous and clear enough to give the jury notice of LTS’s statutory duty to disclose the repairs and Keeton’s legal obligation to establish causation between the undisclosed repairs and the ultimate engine problem on the truck.

2. Admissibility of evidence concerning the odometer rollback

Keeton contends that the trial court improperly excluded evidence about an alleged odometer rollback and the implications resulting from a violation of KRS 190.270. Additionally, he puts forth the argument that this evidence is necessary, in particular, to establish the damages occurred based on LTS’s violation of KRS 186A.540. Before addressing Keeton’s line of argument here, we observe that regarding evidentiary matters, our standard of review is limited to a determination of whether the trial court abused its discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky.2000). “The test for abuse of discretion is whether the trial [court’s] decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Id.* at 581.

Reciting the evidentiary basis for determining relevancy of evidence found in Kentucky Rules of Evidence (KRE) 401 – 403, Keeton strongly posits

that the documentation of the odometer rollback is highly relevant, does not prejudice LTS, and does not confuse or mislead the jury, and hence, should be admissible. In reply, LTS perfunctorily states that there was no odometer rollback, but as we are not fact-finders, that is not a part of our analysis. Instead, our question is whether the trial court properly ruled the evidence inadmissible.

LTS maintains that because Keeton did not appeal from the trial court's order granting the motion in limine and because he did not make any avowal of evidence outside the presence of the jury, the issue has not been preserved for review. Contrary to this reasoning, however, is the language of KRE 103(d), which says that "[a] motion in limine resolved by order of record is sufficient to preserve error for appellate review." Hence, the issue is preserved for our consideration.

According to the record, the odometer rollback pursuant to KRS 190.270 was not claimed as a cause of action prior to the grant of the summary judgment or our Court's affirmation of the summary judgment with reference to the fraud claim. Rather, it became an issue a few days before the actual trial when Keeton moved to amend his complaint and include the violation of KRS 190.270 as a cause of action. Moreover, he stated that this information was vital to the damages to be proven from LTS's alleged violation of KRS186A.540.

The history of the issue is as follows: it first appeared in the action as evidentiary support for the fraud claim including a reference to KRS 190.270. As remarked above, our Court affirmed the summary judgment regarding the fraud

allegation, and hence, the law-of-the-case doctrine (explained above) precludes our consideration of the odometer rollback as related to the fraud issue. In other words, our Court, in its previous decision directly related to this case, already determined, with reference to KRS 190.270, that the odometer rollback did not support the claim of fraud.

Next, we disagree with Keeton's assertion that odometer rollback is integral to establish damages by LTS for its failure to disclose information about repairs. That causation is attenuated and not convincing. We conclude that a mere statement of the necessity for this evidence with regards to KRS 186A.540 and its use as a cause of action is only bootstrapping the "alleged" violation as a causative factor. Coupled with the fact that it was pled immediately before the trial and already denied as supportive of a fraud claim, the so-called causative nature of the odometer rollback is not compelling. Accordingly, with regard to the admissibility of the evidence regarding the odometer rollback, in essence, because of the Court of Appeals grant of summary judgment regarding the issue of fraud, this evidence was no longer relevant and since Keeton did not establish any relationship between a violation of KRS 190.270(2) and the failure to disclose repairs, the trial court did not abuse its discretion when it granted the motion in limine.

3. Denial of Keeton's motion to amend the complaint

Keeton's final claim in this appeal is that the trial court improperly denied him the right to amend his complaint to assert a claim at the trial for violation of KRS 190.270(2). Clearly, this issue is somewhat intertwined with the

previous discussion although we have determined that evidence of the odometer rollback has no bearing on the evidentiary needs to establish damages following the violation of KRS 186A.540.

The Kentucky Rules of Civil Procedure provide that leave to amend a complaint “shall be freely given when justice so requires.” CR 15.01. Kentucky case law further holds that the option of granting a motion to amend is solely within the discretion of the trial court, “whose ruling will not be disturbed unless it is clearly an abuse.” *Laneve v. Standard Oil Co.*, 479 S.W.2d 6, 8 (Ky. 1972) (quoting *Graves v. Winer*, 351 S.W.2d 193 (Ky. 1961)). In this particular case, the Kentucky Supreme Court held that a trial court's denial of leave to amend a complaint is not an abuse of discretion when the action had been pending for several years and a motion for summary judgment has been made. *Id*

Here, Keeton’s motion also came after the grant of summary judgment plus a Court of Appeals decision affirming the issue relevant to KRS 190.270(2). Additionally, Keeton’s original complaint was filed in April 2003 and the Court of Appeals decision was rendered in July 2008. Consequently, more than eight years lapsed between the filing of the initial complaint and Keeton’s motion to amend. And, the motion to amend the complaint was filed two weeks before the trial and was a retread of an already tendered claim.

Thus, we conclude that the trial court did not abuse its discretion when it denied the motion to amend the complaint. First, our Court remanded this case on one, narrow issue – an alleged violation of the damage-repair disclosure

statute. Second, given the length of time Keeton had prior to amending his complaint and the circumstances of the case, the trial court did not abuse its discretion in denying Keeton's motion to amend the complaint. Lastly, litigants are prohibited from raising new issues on remand from an appeal when those issues were known or could have been known. *Schrodt's Ex'r v. Schrodt*, 189 Ky. 457, 225 S.W. 151 (Ky. App. 1920). Common sense dictates this result or litigation would be interminable.

CONCLUSION

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Sam H. Whitehead
Lexington, Kentucky

BRIEF FOR APPELLEE:

Frank T. Becker
Lexington, Kentucky