IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROB QUINN,	)	**No. 27418-7-III**
	)	
Appellant,	)	
	)	
v.	)	
	)	
CHERRY LANE AUTO PLAZA, INC., a Washington Corporation; TIM McKENNA AND JANE DOE McKENNA, husband and wife; MICHAEL D. LILLEY AND SONIA M. LILLEY, husband and wife; and WESTERN SURETY COMPANY, a foreign Corporation,	)	**Division Three**
	)	
Respondents.	)	**PUBLISHED OPINION**

Korsmo, J. — The trier-of-fact did not find Rob Quinn's evidence compelling and entered a judgment for the defendants. Mr. Quinn appeals. This court does not reweigh evidence and make its own factual determinations. Accordingly, the judgment is affirmed.

FACTS

This case revolves around Mr. Quinn's efforts to purchase a used 2003 Chevrolet Silverado truck from respondent Cherry Lane Auto Plaza, Inc. (Cherry Lane). Michael Lilley purchased the vehicle at auction for Cherry Lane. The odometer cluster did not properly illuminate, so a replacement cluster was ordered from a used parts dealer on December 21, 2006. Mr. Lilley planned to have the replacement cluster substituted and the odometer reset by an outside business to reflect the correct mileage. Ten days later Mr. Lilley suffered a heart attack and was hospitalized until January 17, 2007.

While Mr. Lilley was out, the replacement part arrived and was installed by Discount Auto, a business owned by Cherry Lane, instead of by the outside firm. The odometer was not reset and reflected 26,814 miles instead of the vehicle's actual 84,901 miles. Discount Auto returned the Silverado to Cherry Lane, where it was parked on a section of the lot not normally used for selling vehicles. The vehicle was marked "for sale."

Mr. Quinn visited the dealership on January 25, 2007, and saw the Silverado. He wanted to buy it, but could not reach a deal that included acceptable monthly payment terms. He left the lot. Shortly after he returned home, Mr. Quinn received a phone call from Tim McKenna, finance manager and acting general manager of Cherry Lane. Mr.

Quinn agreed to return to Cherry Lane that evening.

He and McKenna reached an agreement. Mr. Quinn would trade in four operable vehicles and produce title for them within five days of the Silverado being picked up.[1] The sales agreement also provided that Cherry Lane could demand return of the Silverado if the lending institution refused to finance the purchase. The odometer disclosure statement prepared as part of the sales paperwork represented the vehicle's mileage as 26,814. Mr. Quinn drove away with the Silverado.

Mr. McKenna did not know that the odometer statement was incorrect. The listed mileage was within the expected range for the age of the vehicle, which was in overall good condition. The actual mileage information was available at the dealership, but sales staff did not normally access the information in accordance with Cherry Lane's internal business practices. It was also the practice at other local dealers that similar internal documents were not typically available to sales staff.

Mr. Lilley returned to work and learned of the sale—and the incorrect odometer reading—shortly after Mr. Quinn took possession of the Silverado. He advised Mr. McKenna of the facts. Mr. McKenna informed the bank the following day of the odometer discrepancy and the financing was cancelled. Mr. Lilley also directed Mr. McKenna to inform Mr. Quinn and have the Silverado returned and, if necessary, cancel

[1] Two of the four vehicles turned out to be inoperable.

the transaction.

Mr. McKenna attempted to contact Mr. Quinn by telephone, but was unable to reach him until January 29. He apologized to Mr. Quinn and offered to cancel the transaction and renegotiate. He also asked Mr. Quinn to bring the Silverado in so that the odometer could be reset. Mr. Quinn was offered the use of any vehicle on the lot while the work was done. Further negotiations ensued at the dealership that day, but no agreement was reached. Mr. Quinn departed without leaving the Silverado.[2]

Mr. McKenna was unable to reach him the following day. On the evening of January 31, Cherry Lane repossessed the Silverado by use of a towing company. The dealership stored Mr. Quinn's personal belongings, but he declined to retrieve them or his traded-in vehicles. At the time of the repossession, Mr. Quinn had turned over two of the four trade-in vehicles. He also had not provided title to one of them.

Mr. Quinn filed suit March 12, 2007. A five-day bench trial was held in June, 2008. The following month the court issued a memorandum opinion ruling in favor of the defendants and dismissing all causes of action. The court reasoned that Cherry Lane's actions showed no intent to deceive or defraud Mr. Quinn under the state and federal odometer laws and there was no completion of the vehicle sale due to the failure

[2] Mr. Quinn testified in his deposition that he was not going to turn the Silverado over to the dealership and "I told him that the ball was in their court, make me, you know, make me happy." Clerk's Papers (CP) 48.

to turn over four working vehicles with valid titles. The court expressly found Mr. McKenna's testimony about the dealings was more credible than Mr. Quinn's version. Written findings of fact and conclusions of law were entered August 22. Mr. Quinn then timely appealed to this court.

ANALYSIS

The appellant raises several statutory claims relating to odometers and dealer practices, including a claim for conversion of personal property. The bench verdict disposes of most claims, and the court's legal determination that the sale was never completed resolves the others.

Federal Odometer Statute

Federal law requires one who transfers a vehicle to another to disclose known irregularities in the odometer reading. 49 U.S.C. § 32705. A private right of action is created in 49 U.S.C. § 32710:

> **(a) Violation and amount of damages.** A person that violates this chapter or a regulation prescribed or order issued under this chapter, *with intent to defraud*, is liable for 3 times the actual damages or $1,500, whichever is greater.
>
> **(b) Civil actions.** A person may bring a civil action to enforce a claim under this section in an appropriate United States district court or in another court of competent jurisdiction. The action must be brought not later than 2 years after the claim accrues. The court shall award costs and a reasonable attorney's fee to the person when a judgment is entered for that person.

(Emphasis added.)

Case law confirms the plain meaning of the statute. A civil action is available only if the purchaser establishes that the transferor acted with intent to defraud. *E.g.*, *Suiter v. Mitchell Motor Coach Sales, Inc.*, 151 F.3d 1275, 1282 (10th Cir. 1998).

The trial court found that Cherry Lane did not act with intent to defraud and, thus, denied recovery under the statute. Mr. Quinn argues that the dealership's actual knowledge of the correct odometer reading should be imputed to its sales staff and that intent to defraud should then be found as a matter of law. While we agree that knowledge can be imputed to the sales staff, we disagree that this court can find fraudulent intent as a matter of law. The basic problem with appellant's argument is that it is directed to the wrong court.

Intent is a factual determination. "Whether one intended, at a specified time, to defraud another of his property is a question of fact to be resolved by the trier of the facts." *State v. Konop*, 62 Wn.2d 715, 718, 384 P.2d 385 (1963); *accord*, *State v. Etheridge*, 74 Wn.2d 102, 109, 443 P.2d 536 (1968); *State v. Bryant*, 73 Wn.2d 168, 171, 437 P.2d 398 (1968); *State v. Smithers*, 67 Wn.2d 666, 669, 409 P.2d 463 (1965).

The trial court's verdict here brings into play very well-settled law. The function of the appellate court is to review the action of the trial courts. Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-

fact. Instead, they must defer to the factual findings made by the trier-of-fact. *See*, *e.g.*, *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 572, 575, 343 P.2d 183 (1959). "Judgment as to the credibility of witnesses and the weight of the evidence is the exclusive function of the jury." *State v. Smith*, 31 Wn. App. 226, 228, 640 P.2d 25 (1982).

It is one thing for an appellate court to review whether sufficient evidence supports a trial court's factual determination. That is, in essence, a legal determination based upon factual findings made by the trial court. In contrast, where a trial court finds that evidence is insufficient to persuade it that something occurred, an appellate court is simply not permitted to reweigh the evidence and come to a contrary finding. It invades the province of the trial court for an appellate court to find compelling that which the trial court found unpersuasive. Yet, that is what appellant wants this court to do. There was conflicting evidence in this case. The trial judge weighed that conflicting evidence and chose which of it to believe. That is the end of the story.

The testimony at trial with respect to intent to defraud illustrates the matter. There was testimony that sales personnel did not have access to internal dealer information about a vehicle. Coupled with evidence that the dealership disclosed an incorrect reading, a trier-of-fact justifiably could infer that Cherry Lane management intended to

defraud a purchaser by keeping its own sales staff in the dark about the correct mileage.

There was also evidence to the contrary. Immediately upon discovering the error, Cherry Lane attempted to contact Mr. Quinn and the bank handling the financing. Its actions in disclosing the problem and offering alternatives to Mr. Quinn could easily convince a trier-of-fact that only an innocent error occurred and that Cherry Lane was not trying to benefit from the incorrect mileage reading.

The trial court accepted the second scenario. It was entitled to do so. More importantly, this court is not entitled to second-guess that determination. *Hesperian Orchards*, 54 Wn.2d at 572.

State Odometer Statutes

Several sections of the motor vehicle code prohibit actions taken to alter odometer readings or sell a car without disclosing that an odometer has been replaced. RCW 46.37.540-.570. A private right of action is created by RCW 46.37.590. The trial court decided that Mr. Quinn had not shown that Cherry Lane violated the statutes because it did not act with knowledge of the odometer error and did not intend to defraud him. The court also concluded that the statutes were not violated because no sale of the vehicle took place. CP 84.

Mr. Quinn challenges these conclusions, arguing first that no intent to defraud

element exists in the state odometer statutes. We agree.

RCW 46.37.540(2) states: "It shall be unlawful for any person to disconnect, turn back, turn forward, or reset the odometer of any motor vehicle with the intent to change the number of miles indicated on the odometer gauge." On its face, the statute requires proof of the intent to change numbers; it does not require proof of intent to defraud.

RCW 46.37.550 provides:

> It shall be unlawful for any person to sell a motor vehicle in this state if such person has knowledge that the odometer on such motor vehicle has been turned back and if such person fails to notify the buyer, prior to the time of sale, that the odometer has been turned back or that he has reason to believe that the odometer has been turned back.

This court has previously concluded, in a criminal prosecution, that there is no intent to defraud element in this statute. *State v. Waldenburg*, 9 Wn. App. 529, 531-532, 513 P.2d 577, *review denied*, 83 Wn.2d 1002 (1973); *State v. Rentfrow*, 15 Wn. App. 837, 841, 552 P.2d 202 (1976), *review denied*, 88 Wn.2d 1007 (1977).

RCW 46.37.560 appears to be the most directly applicable statute to this case.

> It shall be unlawful for any person to sell a motor vehicle in this state if such person has knowledge that the odometer on such motor vehicle has been replaced with another odometer and if such person fails to notify the buyer, prior to the time of sale, that the odometer has been replaced or that he believes the odometer to have been replaced.

Id. This statute, like § .550, only requires that a person act knowingly. As with that statute, we see no basis for reading an implicit intent to defraud element into this section.

To the extent that it required such proof, the trial court erred. However, the trial court also based its determination on the failure to prove the knowledge element required by the statutes.

RCW 46.37.590 provides a civil cause of action against a seller of a vehicle:

> In any suit brought by the purchaser of a motor vehicle against the seller of such vehicle, the purchaser shall be entitled to recover his court costs and a reasonable attorney's fee fixed by the court, if: (1) The suit or claim is based substantially upon the purchaser's allegation that the odometer on such vehicle has been tampered with contrary to RCW 46.37.540 and 46.37.550 or replaced contrary to RCW 46.37.560; and (2) it is found in such suit that the seller of such vehicle or any of his employees or agents knew or had reason to know that the odometer on such vehicle had been so tampered with or replaced and failed to disclose such knowledge to the purchaser prior to the time of the sale.

This statute in essence requires proof of a violation of §§ .540, .550, or .560, and a knowing failure to disclose information about the odometer change. In addition to finding that Cherry Lane did not intend to defraud Mr. Quinn, the court also concluded that it "did not have either actual or constructive knowledge of the odometer discrepancy" when it offered the vehicle for sale. CP 84.

Mr. Quinn argues vigorously that Cherry Lane had in its possession evidence of the vehicle's actual mileage and, thus, was in violation of the statute. We agree that the evidence would have permitted the trier-of-fact to reach such a conclusion. Some personnel at Cherry Lane knew that the Silverado had a new odometer with a different mileage figure. The sales personnel, however, did not.

As with the previous issue, the question here is not what this court believes. The actual question is what the trier-of-fact believed. Whether or not someone acted knowingly is a factual question for the trier-of-fact. *Equipto Div. Aurora Equip. Co. v. Yarmouth*, 134 Wn.2d 356, 371, 950 P.2d 451 (1998); *Everest v. Levenson*, 15 Wn. App. 645, 648, 551 P.2d 159, *review denied*, 87 Wn.2d 1011 (1976). The trial judge was not persuaded that Cherry Lane acted knowingly when it sold the Silverado with significantly understated mileage. As with the factual question of intent, that factual determination cannot be reweighed in this forum. *Hesperian Orchards*, 54 Wn.2d at 572; *Smith*, 31 Wn. App. at 228. Mr. Quinn's failure to prove this point at trial is binding in this appeal. He did not establish a violation of RCW 46.37.590.

The trial court also concluded that the statute was not violated because the "sale" was not completed.[3] The court determined that Mr. Quinn had not lived up to his bargain because he failed to produce four operable vehicles with clear titles and failed to obtain financing. In essence, he did not pay for the Silverado because he did not complete his down payment (the four cars constituted two-thirds of the down payment) and was not able to finance the balance when the odometer problem came to light.[4]

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[3] The trial court also concluded that the parties mutually rescinded the contract due to the odometer mistake. We need not address that issue in light of our resolution of the other issues.

[4] In fairness to Mr. Quinn, it is understandable that he put his payment obligations on hold once the original deal fell apart. Nonetheless, he is the one arguing that there

Failure to perform a condition precedent will discharge the duties of the parties to a contract. *Salvo v. Thatcher*, 128 Wn. App. 579, 586, 116 P.3d 1019 (2005); *CHG Int'l, Inc. v. Robin Lee, Inc.*, 35 Wn. App. 512, 514-515, 667 P.2d 1127, *review denied*, 100 Wn.2d 1029 (1983); *Local 112, I.B.E.W. Building Ass'n v. Tomlinson Dari-Mart, Inc.*, 30 Wn. App. 139, 142-143, 632 P.2d 911, *review denied*, 96 Wn.2d 1017 (1981). Here, one of the conditions precedent to completing the sale involved Mr. Quinn making his down payment and financing the balance. That did not occur for very understandable reasons. Nonetheless, the failure to perform these conditions meant that this sale was not completed. The trial court did not err in so concluding.

For the additional reason that there was no sale, there also was no violation of RCW 46.37.590.

Auto Dealer Practices Act

Mr. Quinn also argues that Cherry Lane violated RCW 46.70.180, a statute that outlaws numerous improper practices by car dealers, in four different ways. Once again, the basic problem in this appeal is that the trial court did not find his claims persuasive.

RCW 46.70.027 provides a right of action to any retail vehicle purchaser who has "suffered a loss or damage" because of a violation of chapter 46.70 RCW.[5] RCW

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was a completed sale, so his performance under the contract must be reviewed.

[5] In light of the trial court's ruling on the persuasiveness of the evidence, we do not address whether or not Mr. Quinn also showed that he suffered damage or loss.

46.70.180(5) essentially repeats RCW 46.37.590 by making it unlawful to commit offenses relating to odometers under RCW 46.37.540-.570.[6] Mr. Quinn's claim under this statute fails for the same reasons the RCW 46.37.590 claim failed in the trial court — he did not prove that Cherry Lane acted knowingly and he did not prove that a sale took place.

Mr. Quinn also alleges that Cherry Lane violated RCW 46.70.180(1) and (2) by not including all financing information in one document and by including the false odometer reading in the sales paperwork. The trial court's sole conclusion on these claims simply states that Mr. Quinn "failed to prove a violation by preponderance of the evidence." CP 86.[7] As we stated previously, this court cannot reweigh the evidence and reach a different conclusion than the trial court. *Hesperian Orchards*, 54 Wn.2d at 572.

Finally, Mr. Quinn alleges that Cherry Lane converted his personal property when it repossessed the Silverado and did not return the personal property therein to him. RCW 46.70.101 provides that a dealer's license may be suspended or revoked for various improper practices, including conversion of a customer's personal property. Mr. Quinn also pleaded a common law conversion claim.

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[6] This subsection also makes it a class C felony to tamper with odometers.

[7] Mr. Quinn also argues that the trial court ruled as a matter of law that financing statements could be in multiple documents, citing to CP 53. That is not correct. CP 53 references the trial court's discussion of whether the sales agreement was a fully integrated agreement or not. It does not discuss the financing paperwork claim.

The trial court also found this claim unproven. CP 85-86. That was understandable. Mr. Quinn refused to claim the property at the dealership once it was inventoried and removed from the Silverado. Cherry Lane made no efforts to do anything with the property other than preserve and return it. The fact that Mr. Quinn declined to retrieve it did not show that Cherry Lane made the property its own.

The auto dealer practices act claims were not proven. This court cannot reweigh the evidence and conclude otherwise.

Consumer Protection Act

The trial court concluded that because the odometer statutes were not violated, there also was no deceptive practice under the Consumer Protection Act (CPA), chapter 19.86 RCW. We agree.

"Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." RCW 19.86.020. A person injured by a violation of RCW 19.86.020 or other sections of chapter 19.86 may bring a civil action for damages. RCW 19.86.090.

The elements of a CPA violation under that section are (1) an unfair or deceptive act or practice, (2) in trade or commerce, (3) which affects the public interest, (4) injury to the plaintiff, and (5) a causal link between the unfair or deceptive act and the injury.

Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 784-785, 719 P.2d 531 (1986). A violation of chapter 46.70 RCW constitutes a violation of the CPA. RCW 46.70.310.

Finding no violation of chapter 46.70 RCW, the trial court concluded that no violation of the CPA was established. That is correct. In the absence of a proven deceptive act in violation of the chapter, elements one and three of the *Hangman Ridge* test are not satisfied. In view of that, there is no need to discuss whether elements four and five were proven or not.

The trial court correctly concluded that the CPA was not violated.

CONCLUSION

The trier-of-fact concluded it was not satisfied with the evidence supporting the claim that Cherry Lane knowingly violated state and federal statutes governing odometers and/or financing statements. While there was competing evidence that would have permitted contrary results, this court does not reweigh evidence and substitute its

judgment for that of the trier-of-fact. Accordingly, the judgment of the trial court is affirmed.

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Korsmo, J.

I CONCUR:

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Brown, J.