IN THE COURT OF APPEALS 10/29/96

OF THE

STATE OF MISSISSIPPI

NO. 93-CA-01340 COA

PATTERSON-MORRIS

LINCOLN-MERCURY, INC.

APPELLANT

v.

CHARLES MAGEE

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. ROBERT G. EVANS

COURT FROM WHICH APPEALED: COVINGTON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

L. CLARK HICKS, JR.

ATTORNEY FOR APPELLEE:

TRAVIS BUCKLEY

NATURE OF THE CASE: BREACH OF WARRANTY IN SALE OF USED CAR

TRIAL COURT DISPOSITION: JURY VERDICT OF $2,600.00 IN FAVOR OF THE PLAINTIFF

BEFORE THOMAS, P.J., COLEMAN, AND SOUTHWICK, JJ.

THOMAS, P.J., FOR THE COURT:

SUMMARY

Charles Magee purchased a 1980 Lincoln Mark VI from Patterson-Morris Lincoln Mercury ("the dealership") in December of 1987. After trading another vehicle for which he received credit of $2, 350.00, Magee paid the dealership $2,698.30 for the Lincoln for a total purchase price of $4,950. 00 plus tax. Magee received an "as is-no warranty" form when he purchased the vehicle; however, Magee insists that the form was not on the car window, as required by the Magnuson-Moss Warranty Act.

Magee and his wife testified that the vehicle began malfunctioning as they were driving home from the dealership. Magee testified that the car "wouldn't pull," "wouldn't pick up no speed," "would start to jiggling and jumping around" and was always "stopping in the road." Magee's wife testified that the car did not run well, and the car lights would dim. She also testified that they had to use battery jumper cables in order to crank the car on several occasions and that, on one occasion, the car was "red hot" and would smoke.

Magee notified the dealership that he was having problems with the car. One week after the sale, the dealership replaced the car's transmission fluid at no charge to Magee. Two months after the sale, the dealership replaced the trunk shocks on the car, again at no charge to Magee. Soon thereafter, the dealership overhauled the carburetor and did not charge Magee for the parts. Although Magee agreed to pay $100.00 for the labor costs for this repair, he failed to do so. Within the next month, the dealership replaced a computer module, an EGR valve and a sensor, all without charge to Magee. After these repairs were made and he was billed the $100.00 labor charge for the carburetor repair, which he did not pay, Magee did not return to the dealership or further inform the dealership about the car.

Magee filed suit against the dealership in 1988, alleging breach of contract, negligence, and breach of warranty. The case proceeded to trial on the claim for breach of an implied warranty of merchantability. At the close of Magee's case, the dealership moved for a directed verdict, which the trial court denied. The trial court also denied the dealership's peremptory instruction on liability. After the jury rendered a verdict in favor of Magee for $2,600.00, the dealership appealed, assigning as error the following issues which we have renumbered: (1) Magee was not entitled to recover for breach of warranty since the car was sold without any warranty; (2)Magee failed to provide sufficient evidence to prove breach of the implied warranty of merchantability; (3) the trial court improperly granted jury instruction P-6 ; and (4) Magee failed to provide sufficient evidence of damages for breach of the implied warranty of merchantability.

ANALYSIS

I. WAS THE CAR SOLD WITHOUT ANY IMPLIED

WARRANTY OF MERCHANTABILITY?

The dealership asserts that Magee should be barred from recovery since it sold the car "as is," without any express or implied warranties. Mississippi allows automobile dealers to disclaim implied warranties on used cars that are more than six model years old or have been driven more than 75,000 miles. Section 75-2-315.1 provides:

(1) Any oral or written language used by a seller of consumer goods and services, which attempts to exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify the consumer's remedies for breach of those warranties, is unenforceable. . . .

(3) (a) The provisions of this section do not apply to a motor vehicle: (i) Required to be titled under the state law; (ii) That is over six (6) model years old or that has been driven more than seventy-five (75,000) miles; and (iii) If, at the time of the sale of the motor vehicle, the seller gives the purchaser notice of the inapplicability of this section on the form prescribed by the State Attorney General.

(b) (i) Any exclusion or modification of an implied warranty of merchantability, or any part of a warranty under this subsection shall be in writing, mention merchantability, and be conspicuous. (ii) An exclusion or modification of the implied warranty of fitness shall be in writing and conspicuous. (iii) Any exclusion or modification of either warranty shall be separately acknowledged by the signature of the buyer.

Miss. Code Ann. § 75-2-315.1 (Supp. 1995).

However, in order for a Mississippi seller to effectively disclaim implied warranties on such a used car, the seller must also comply with the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et. seq*., (the "Act"), and the Used Car Rule, which was developed pursuant to the Act. Under the Used Car Rule, the seller of a used car must display a "Buyer's Guide" on the side window of the vehicle being offered for sale which specifically informs the buyer that the vehicle is being offered for sale "as is" with no warranty. Used Motor Vehicle Trade Regulation Rule, 16 C.F.R. §§ 455.1-3 (1987). Since there was conflicting evidence on whether the Buyer's Guide was indeed attached to the side window of the car, the question of whether the dealership validly disclaimed the implied warranties was a fact question for the jury and was properly submitted to the jury. There issue has no merit.

II. WAS THERE SUFFICIENT EVIDENCE TO ESTABLISH A BREACH OF

THE IMPLIED WARRANTY OF MERCHANTABILITY?

Since the car was sold with an implied warranty of merchantability, Magee may attempt to prove a breach of the implied warranty of merchantability. In order for goods to be merchantable under Mississippi law, the goods must be "fit for the ordinary purpose for which such goods are used." Miss. Code Ann. § 75-2-314 (1972).

In differentiating the definition of "merchantability" for new and used goods, the Mississippi Supreme Court has recognized:

Merchantability is different for new and used goods of the same type. Used goods are reasonably expected to require more maintenance and repair and their quality should not be measured on the same scale as that of new goods. Used goods should be compared to similar used goods. If they conform to the quality of other similar used goods, they will normally be merchantable.

Beck Enterprises, Inc. v. Hester, 512 So. 2d 672, 676 (Miss. 1987). Magee was required to show that the car that he bought from the dealership did not conform to the quality of similar used goods--other six-year old used cars that had been driven approximately 70,000 miles and sold for approximately $5,000.00 dollars.

The testimony about the condition of the car consisted of general statements by Magee and his wife. Magee testified that the car "wouldn't pull," "wouldn't pick up no speed," "would start to jiggling and jumping around" and was always "stopping in the road." Magee's wife testified that the car did not run well, that the car lights would dim, and that they had to use battery jumper cables in order to crank the car on several occasions. She also stated that, on one occasion, the car was "red hot" and would smoke.

Contrasted with other automobile implied warranty cases which the Mississippi Supreme Court has affirmed, there is scant evidence that the Magees' car was not comparable in quality to similar used cars. *See Hester*, 512 So. 2d at 674 (four-year-old used car in which buyer had to repair or replace engine, drive shaft, transmission, fuel pump, water pump, brakes . . . within five months of purchase); *Royal Lincoln-Mercury Sales, Inc. v. Wallace*, 415 So. 2d 1024, 1025-26 (Miss. 1982) (a new car in which the air conditioner failed, chrome rattled, vinyl roof peeled, paint faded, and oil leaked within four months of purchase).

However, our scope of review on appeal of a challenge to the sufficiency of the evidence supporting a jury verdict is very limited. The denial of a motion for JNOV is analyzed as follows:

> [The evidence is considered] in the light most favorable to the appellee, giving that party the benefit of all favorable inferences that may be reasonably drawn from the evidence. If the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, [then the Court is] required to reverse and render. On the other hand if there is substantial evidence in support of the verdict, that is, evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, affirmance is required.

American Fire Protection, Inc. v. Lewis, 653 So. 2d 1387, 1390-91 (Miss. 1995) (citations omitted). Applying this standard to the case at bar, we cannot find that the facts so overwhelmingly favor the dealership that the judgment of this Court should be substituted for that of the jury and the trial court. For this reason, we must find that this issue is without merit.

III. DID THE TRIAL COURT IMPROPERLY GRANT JURY INSTRUCTION P-6?

Instruction P-6 provided as follows:

> If you find from a preponderance of the evidence presented for your consideration in this case that the defendant sold the plaintiff a car that would not perform the services for which it was designed,

that being transportation for the plaintiff, then you shall find for the plaintiff and access his damages at the value of the vehicle less any use that the defendant has proven to you he got from the vehicle.

Instruction P-6 was the only instruction to the jury on the issue of damages, and it improperly instructed the jury on the measure of damages for breach of warranty. *See* Miss. Code Ann. § 75-2-714 (1972). The jury should have been instructed that the proper measure of damages was "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount." *Id.* Magee could possibly have also recovered incidental and consequential damages. *See* Miss. Code Ann. § 75-2-715 (1972).

However, since the final issue is dispositive and requires us to reverse and render this case, we need not address this issue further.

IV. WAS THERE SUFFICIENT EVIDENCE OF DAMAGES FOR

BREACH OF THE IMPLIED WARRANTY OF MERCHANTABILITY?

The dealership asserts that Magee failed to prove any damages for breach of warranty. When a buyer has accepted goods and subsequently discovers a breach of the implied warranty of merchantability, he may either revoke acceptance and recover the purchase price under section 75-2-711 or accept the nonconforming goods and sue for damages under section 75-2-714. *See Hester*, 512 So. 2d at 676-77; *see also* Miss. Code Ann. §§ 75-2-711, -714 (1972).

In order to effectively revoke acceptance, the buyer must revoke acceptance within a reasonable time after he discovers or should have discovered the ground for revocation, and he must notify the seller of the revocation. Miss. Code Ann. § 75-2-608 (1972). If a buyer can show revocation under section 75-2-608, he may recover the purchase price of the goods under section 75-2-711.

The record is unclear as to what happened to the vehicle. The only testimony at trial regarding the final location of the vehicle was by Magee's wife, when she stated, "one night . . . we pulled it to the Ford place and then he left it there. They didn't work on it. So, we never did get it--I don't know where they took it from there." The owner of the dealership testified that he had not seen the vehicle since the dealership repaired the ERG valve and a sensor on March 1, 1988.

The final location of the vehicle is of little import, in any event, to the disposition of this matter because Magee never pled, attempted to prove with positive evidence, or requested that the jury be instructed on revocation as a theory of recovery of the purchase price of the vehicle. Because he did not plead, prove, or request any instructions on this theory, Magee cannot recover the purchase price of the vehicle. His recovery is limited to section 75-2-714, which governs damages for breach of warranty with respect to goods that have been accepted and acceptance has not been effectively revoked.

Under section 75-2-714, a buyer's damages for breach of warranty are: "[T]he difference at the time

and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount." *Id.* § 75-2-714. Section 75-2-715 also provides for the recovery of incidental and consequential damages. *Id.* § 75-2-715.

Magee had the burden of proving damages. *Gast v. Rogers-Dingus Chevrolet*, 585 So. 2d 725, 731 (Miss. 1991). If the car could have been repaired to function properly, the proper measure of damages would have been the cost of repairs. If the car could not have been repaired and was worthless, the proper measure of damages would have been a refund of the purchase price. *Fedders Corp. v. Boatright,* 493 So. 2d 301, 309 (Miss. 1986).

As in *Gast*, there is no proof whatsoever in the record as to damages. Magee submitted no repair bills or evidence as to the cost of repairs. There was no expert or lay testimony about the value of the car at the time of trial. Although there was testimony showing the repairs made to the vehicle by the dealership, there was no expert or lay testimony to show what was wrong with the car at the time it was left wherever it was abandoned by the Magees. Further, the mere fact that the car was unmerchantable is not sufficient to prove that it was worthless, thereby entitling Magee to a refund of the purchase price.

As the *Gast* court recognized, the burden of proving damages cannot be met by "mere conjecture or inferences unsupported by adequate evidence." *Gast*, 585 So. 2d at 731. Since Magee failed to prove damages, there was no basis for the jury's award of damages, and we must reverse and render.

THE JUDGMENT OF THE CIRCUIT COURT OF COVINGTON COUNTY IS REVERSED AND RENDERED. ALL COSTS ARE ASSESSED TO THE APPELLEE.

FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.

KING, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION.

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KING, J., CONCURRING IN PART, DISSENTING IN PART:

I would join the majority opinion, except as regards the remedy. The majority would reverse and render, I would reverse and remand.

The majority suggests, and I agree, that an improper measure of damages was used, and that no damages were proven under the proper standard.

Because damages were proven, although under an improper standard, I would reverse and remand for a new trial.