

1992

Marilyn J. Bloomer v. Kim Edward, Kim Edward Conover and Karen Jane Conover, a Utah General Partnership dba K and K Sales, and Western Surety Company, a corporation : Brief of Appellant

Utah Court of Appeals

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920450
IN THE UTAH COURT OF APPEALS

MARILYN J. BLOOMER
plaintiff and appellee

vs

BRIEF OF
APPELLANTS

KIM EDWARD, KIM EDWARD CONOVER
and KAREN JANE CONOVER, a Utah
General Partnership dba K & K SALES;
and WESTERN SURETY COMPANY,
a corporation,
defendants and appellants.

CASE No. 91-400-CA

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JUL 27 1992

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JURISDICTION

The Court of Appeals has jurisdiction over this matter pursuant to Section 78-2-2(4), Utah Code Annotated 1953, as amended.

STATUTES

	Page
13-11-4(c)	
(2) Without limiting the scope of Subsection (1), a supplier commits a deceptive act or practice if the supplier, with intent to deceive:	
(c) indicates that the subject of a consumer transaction is new, or unused, if it is not, or has been used to an extent that is materially different from the fact;	6
13-11-4(d)	
(2) Without limiting the scope of Subsection (1), a supplier commits a deceptive act or practice if the supplier, with intent to deceive:	
(d) indicates that the subject of a consumer transaction is available to the consumer for a reason that does not exist;	6, 8

13-11-9(2)

(2) A consumer who suffers loss as a result of a violation of this chapter may recover, but not in a class action, actual damages or \$2,000, whichever is greater, plus court costs. 9, 12

41-6-158(4)(2)

(1) At least once each year the department shall require that every motor vehicle registered in this state or bearing temporary permits or Utah plates, except off-highway vehicles, be inspected and that an official certificate of inspection and approval be obtained for each vehicle.

(2) The inspection shall be made and certificate obtained with respect to the mechanism, brakes, and equipment of every vehicle designated by the department under this section. 3

15 USC 1989 (1) and (2)

(a) Any person who, with intent to defraud, violates any requirement imposed under this subchapter shall be liable in an amount equal to the sum of

(1) three times the amount of actual damages sustained or \$1,500, whichever is the greater; and

(2) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with reasonable attorney fees as determined by the court.

STATEMENT OF THE CASE

Defendants-appellants (hereinafter defendant) acquired a Nissan automobile as a salvage vehicle. Repair and sale of salvage vehicles is common in the used car business and such vehicles can be repaired to be perfectly safe.

Defendant had the vehicle repaired and sold it to plaintiff-appellee (hereinafter plaintiff). It had passed a Utah Safety Inspection. A year later, plaintiff again had the vehicle inspected and again it passed the safety inspection. Plaintiff had driven it some 14,000 miles.

Subsequently, plaintiff had problems with the steering of the vehicle. At that time, it was found to be unsafe to drive.

It is impossible to determine when the damage making the vehicle unsafe to drive occurred, but it was after being driven by plaintiff for over a year, over 14,000 miles, and after the second safety inspection.

Plaintiff claims--inter alia--that defendant misrepresented the condition of the vehicle at the time of sale and the reasons for selling the same, and this was done with intent to deceive.

The Honorable Scott Daniels, Judge of the Third District Court, entered an amended judgment in favor of plaintiff on January 23, 1992, ordering a rescission of the sales contract. None of the parties had requested a rescission. In ordering a rescission, the court did not give defendant any credit or consideration for the benefit plaintiff received by driving the vehicle over 14,000 miles and using it for over a year.

STATEMENT OF FACTS

Defendants and appellants Kim Edward Conover and Karen Jane Conover (husband and wife) are a partnership operating a used car dealership under the name of K & K Sales. Karen Jane Conover takes no part in the management of the business. (TR. 58)

Defendant and appellant Western Surety Company is a corporation authorized to do business in the State of Utah as a bonding company and furnished a bond in the amount of \$20,000 for K & K Sales, as required by the Motor Vehicle Act. (TR. 58, 59)

On October 12, 1987, K & K Sales, acting by Kim Edward Conover, purchased a 1986 Nissan Sentra four wheel drive automobile (the subject vehicle) from Western Affiliated Auction. It had been damaged on the right side and classified as totaled by the insurance company. (TR 46, 47)

Automobiles that have sustained the type of damage incurred by the subject vehicle can be repaired by straightening and squaring so that they are safe. This is done all the time. (TR. 163, 168, 169)

Kim Edward Conover drove the subject vehicle to the shop of defendant David Gray, where it was repaired by an employee of David Gray. Kim Edward Conover furnished needed parts and told David Gray how he wanted it repaired. (TR. 71, 125, 131)

After the subject vehicle was repaired, Karen Jane Conover used it for errands around town. In March or April of 1989, the Conovers determined they needed a different car because Karen Jane Conover was expecting. They then put the subject vehicle up for sale. (TR. 13, 48)

On April 19, 1988, plaintiff purchased the subject vehicle for \$6,800 plus sales tax of \$375. Plaintiff was allowed \$800 toward the sales price for a trade-in of an Escort automobile. Kim Edward Conover paid for the registration.

The NADA (formerly "Blue Book") as of the date of plaintiff's purchase, listed the "high" value of the subject vehicle at \$8,700, and the "low" value at \$7,550. Thus, the purchase price paid by plaintiff was \$750 less than the "low book value." (TR. 14, 147)

Plaintiff testified she was not aware that Kim Edward Conover was a used car dealer until just before she purchased the subject vehicle. (TR. 14, 18, 20)

Defendant testified he told plaintiff he was a used car dealer. He registered the subject vehicle and furnished her with a temporary sticker which permitted her to drive it until he obtained the registration and license plates for her. (TR. 18, 50, 56)

Plaintiff testified that defendant told her the subject vehicle had "the right front fender bent and he had replaced that and the right front headlight." (TR. 16, 17)

Defendant testified that he told plaintiff "all about" the subject vehicle. (TR. 56)

Plaintiff did not ask for a guarantee on the vehicle. (TR. 191)

Pursuant to Section 41-6-158, UCA 1953, as amended, all automobiles registered in Utah are required to have a recent Utah Safety Inspection when ownership is changed, and yearly when the registration is renewed. Persons performing the inspections are

required to be licensed. A manual is provided by the State which governs what is to be inspected and how the inspection is to be performed. This manual sets forth, in detail, the standards vehicles need to meet to pass the safety inspection. These include the movement of wheels and steering, any vertical looseness, looseness in the rods, steering linkage play, wheel bearings, ball joints, torsion bar control arms, etc. (Exh. D-33)

A State of Utah Safety Inspection Certificate for the subject vehicle was furnished to plaintiff when it was registered in her name in April of 1988. (TR. 36)

After the purchase, plaintiff drove the subject vehicle for some 14,789 miles over a period of more than a year. This included a trip to Flagstaff, Arizona, and back. (TR. 21, 41, Exhs. P-2, P-6, P-17)

Plaintiff did not experience any problem with the subject vehicle until the end of October or beginning of November, 1988, some six months after the purchase and after having driven it to Flagstaff. At that time, it began to pull to the right. (TR. 21)

Plaintiff had the subject vehicle aligned on more than one occasion, purchased a total of six tires for it, and had the ball joints replaced. (TR. 21, 22, 23)

In April of 1989 (a year after the purchase) plaintiff was required to renew the registration on the subject vehicle. As stated, renewal of the registration required a recent Utah Safety Inspection Certificate. Plaintiff had the subject vehicle inspected on April 21, 1989. On its face the Safety Certificate shows: "Wheels Pulled: RF RR." The vehicle passed inspection. (Exh. D-13)

After experiencing some problems, approximately three weeks after obtaining the second Utah Safety Inspection Certificate, plaintiff took the subject vehicle to Less Jenson's Collision Repair. It was determined that it had been damaged on the right side and required extensive repairs. Plaintiff was given an estimate of the cost of repairing the subject vehicle which was dated May 15, 1989. (TR. 120, Exh. P-6)

When the subject vehicle was examined at Less Jenson's Collision Repair, it was found unsafe to drive and would not have passed a Utah Safety Inspection. It was not possible to ascertain when the damage was done. But if it passed a safety inspection in April of 1989, following the guidelines and rules set out in Exhibit D-13 (which it did), "it would be safe to assume the damage occurred after that date." (TR. 122, 123, 166, 182, 183)

The damage could have been caused by a "curb, gutter, chuckhole, any number of things, hitting a chuckhole in a hard turn could damage -- put swage -- put a bind on the lower control arm." (TR. 174)

SUMMARY OF ARGUMENTS

1. The evidence and exhibits presented to the court do not show that defendant made any misrepresentations to plaintiff. She knew the car was used and had been repaired. She knew its mileage, and she knew defendant was a dealer whose wife had been using the car for errands.

2. Plaintiff did not suffer any loss because of any act or failure to act of defendant. She drove the vehicle over a year, for over 14,000 miles and had it then inspected for safety in order

to obtain a new registration. It passed this inspection which it could not have done if it had been damaged as claimed at the time it was sold. It is impossible to ascertain when the damage occurred, but it occurred after the last safety inspection.

3. In ordering a rescission the court did not take into account the benefit received by plaintiff by using the vehicle for over a year and driving it more than 14,000 miles. Thus, she was unjustly enriched.

4. Plaintiff was allowed attorney's fees for legal work performed on causes of action on which she did not prevail. She should only be entitled to work done on causes of action on which she was successful.

ARGUMENT

POINT I

THE COURT'S FINDINGS THAT DEFENDANT KIM EDWARD CONOVER MADE FALSE STATEMENTS TO PLAINTIFF WITH INTENT TO DECEIVE IN VIOLATION OF SECTIONS (A) 13-11-4(C) AND (B) 13-11-4(D), UCA 1953, AS AMENDED, ARE NOT SUPPORTED BY THE EVIDENCE.

(A) Section 13-11-4(c), UCA 1953, as amended provides:

(2) Without limiting the Scope of Subsection (1), a supplier commits a deceptive act or practice if the supplier, with intent to deceive:

(c) indicates that the subject of a consumer transaction is new, or unused, if it is not, or has been used to an extent that is materially different from the fact;

The evidence given by plaintiff concerning the representations made by defendant to her with respect to the subject vehicle are as follows:

Q (By Mr. Martineau) Okay, was there any discussions at that time about the condition of the car?

A Not at that point; however, when we were getting ready to leave, we went out into the yard and he told me that the car had, at one point, the right front fender bent and he had replaced the right front headlight.

Q Was anything said about the condition of the vehicle?

A No.

Q Did he tell you it had been wrecked?

A No. Not beyond the fender bender.

Q Did he tell you that it had been totaled?

A No.

Q Did he tell you from whom he had obtained the vehicle?

A No. (TR. 16-17)

Q (By Mr. Barker) I hand you Exhibit P-2 and ask you if this signature appearing on the upper right-hand is your signature?

A It is.

Q I will ask you if the odometer statement reading is not also set forth in that?

A It is.

Q What is that odometer statement; read it for me, will you?

A Yes. It says 21,005 miles. (TR 41, Exh. P-2)

Q (By Mr. Barker) Mrs. Bloomer, you didn't ask Mr. Conover to give you a guarantee on this automobile, did you?

A No, I did not. (TR. 191)

In the foregoing statements given by plaintiff there is no evidence that defendant indicated the subject vehicle was "new, or unused, if it is not, or has been used to an extent that is materially different from the fact." On the contrary, her evidence discloses that she knew the vehicle had been in an accident, that the right front fender and right headlight had been replaced, and that the odometer reading was 21,005 miles.

Furthermore, there is no evidence that defendant made any statement with "intent to deceive." Rather, the evidence was that he had every right to believe the subject vehicle was in safe condition.

The following evidence was given by plaintiff:

Q And now, when you registered it [the subject vehicle] in your name, you had to have a State of Utah Safety Inspection Certificate, did you not?

A In the beginning, I did not; he got it.

Q But there was one and it was furnished when you registered the car in your name?

A Right. (TR. 36)

Moreover, a year and some 14,000 miles later, the subject vehicle was again determined to be safe to drive when plaintiff had it inspected. (Exh. D-13)

(B) Section 13-11-4(d), UCA 1953, as amended provides:

(2) Without limiting the Scope of Subsection (1), a supplier commits a deceptive act or practice if the supplier, with intent to deceive:

(d) indicates that the subject of a consumer transaction is available to the consumer for a reason that does not exist;

The court (page 4 of the Court's ruling) stated:

Also Section D, making it unlawful for the supplier to indicate that the subject of the consumer transaction is available to the consumer for a reason that does not exist, I believe the evidence in this case as I weighted it, would indicate that Mr. Conover indicated the reason that he wanted to sell it was because it was a family car. His wife was pregnant. He needed to get rid of it for that reason.

All those things were technically true. The fact he is a dealer in automobiles was in the business of repairing and selling was not disclosed to the plaintiff. I think that is a violation of Section D. (Emphasis added.)

The following testimony was given by plaintiff:

Q (By Mr. Martineau) Up to this time, were you aware that he was a licensed motor vehicle dealer?

A No.

Q And were you provided with any papers other than this calculator type?

A No. Only that and the window sticker. And at that point I went to give him the check for 6,375 he had let me know that he was an RV dealer, never did mention that he was a dealer, as such. (TR. 18) (Emphasis added.)

Q (By Mr. Martineau) I'll hand you what's been marked for identification as plaintiff's Exhibit 1 and ask you if you can identify that document.

A Yes. That's a copy of the odometer statement.

Q Does that bear your signature?

A Yes, it does.

Q Did Mr. Conover explain what this document was?

A I think he just said that he had--because he was a dealer, had to fill out an odometer statement. (TR. 18) (Emphasis added.)

There is absolutely no evidence that defendant indicated that the subject vehicle was "available" to plaintiff-appellee "for a reason that does not exist." The evidence clearly discloses that he informed plaintiff he was a dealer.

POINT II

PLAINTIFF IS PRECLUDED FROM RECOVERING UNDER THE UTAH CONSUMER SALES PRACTICES ACT BECAUSE SHE DID NOT SUFFER A LOSS.

(A) Section 13-11-9(2), UCA 1953, as amended provides:

(2) A consumer who suffers loss as a result of a violation of this chapter may recover, but not in a class action, actual damages or \$2,000, whichever is greater, plus court costs. (Emphasis added.)

There is no evidence in the record that plaintiff suffered any loss by reason of any act or failure to act of defendant. As previously indicated, the subject vehicle passed a Utah Safety Inspection at the time it was purchased by plaintiff. (TR. 36) After plaintiff had driven it for a year and some 14,000 miles she again had a safety inspection and again it was declared safe. (Exh. D-13)

After the subject vehicle had passed the second Utah Safety Inspection, it was taken to Less Jenson's Collision Repair. It was

examined by Ed Jenson, a witness for plaintiff. He testified as follows:

Q (By Mr. Barker) And you said that in your opinion, the car was unsafe to drive?

A Yes.

Q Then I take it that if you had been inspecting that car for safety to issue a safety certificate, you wouldn't have issued a safety certificate?

A Definitely not. (TR. 122, 123)

Burt DeBock was called as a witness by defendant. He is employed in the Auto Repair Section of Hinckley's Dodge Incorporated. He testified as follows:

Q (By Mr. Barker) All right. Do you know -- and this is a repetition of my first question, but I repeat the question -- you heard the testimony of Mr. Jenson?

A Yes.

Q You heard him testify that a vehicle in the condition that he described would be dangerous to drive?

A Yes.

Q Based upon your own experience in the automobile repair business and on the rules promulgated by the Utah Motor Vehicle Division, would you agree with what he said?

A Yes.

Q When you inspected that vehicle, was there any way that you could tell when it had been damaged?

A No. (Emphasis added.)

Q If it passed a safety inspection in April of 1989, following the guidelines and rules set forth in Exhibit 33(13), would it be safe to assume those damages occurred after that date?

A Yes, if it was done that way. (TR. 166-167) (Emphasis added.)

No witness refuted or contradicted the testimony given by Mr. DeBock.

Jack Lambrose, a heavy duty frame repairman at Hinckley's Dodge, called as a witness by defendant-appellant, testified as follows:

Q (By Mr. Barker) Is it possible to take a car that's been damaged, and straighten the frame or square the frame as it sits here and still have a safe vehicle?

A Yes.

Q Do you do that all the time?

A I do that every day. (TR. 168, 169) (Emphasis added.)

Q What could cause the damage that this vehicle suffered?

A Curb, gutter, chuckhole, any number of things, hitting a chuckhole in a hard turn could damage -- put swage -- put a bind on the lower arm. (TR. 174) (Emphasis added.)

Mr. DeBock's testimony was not refuted or contradicted.

Ed Jenson, called on redirect and recross, after having heard the foregoing testimony, testified as follows:

Q (By Mr. Barker) Please answer the question. Would it have passed a safety inspection by a qualified inspector?

A It would not.

(Objection, which was over-ruled.)

A Yes, With the rephrasing of the question, a qualified safety inspector -- if a qualified safety inspection was done properly, there is no way it would pass. (Emphasis added.)

Q To be a safety inspector in the State of Utah, you have to have a license from the state; do you not?

A I believe that's true.

Q You have to have certain minimum qualifications?

A I believe that is true. (TR. 182, 183)

In summary, plaintiff purchased the subject vehicle in April of 1988. She was furnished with a Utah Safety Inspection Certificate. She drove it for a year and some 14,000 miles, including a trip to Flagstaff, Arizona. In April of 1989, she had a safety inspection made so she could renew the registration. It passed the safety inspection. It could not have passed the safety inspection in the condition in which it was found in May of 1989. The damage occurred after the April 1989 inspection. It is impossible to tell how the damage occurred. It could have been from a "curb, gutter, chuckhole, any number of things ---."

There is a complete lack of proof that plaintiff suffered any loss as a result of any act or failure to act of defendant.

POINT III

AFTER ORDERING A RESCISSION OF THE CONTRACT OF SALE OF THE SUBJECT VEHICLE, THE COURT ERRED IN UNJUSTLY ENRICHING PLAINTIFF-APPELLEE BY REQUIRING DEFENDANT-APPELLANT TO REFUND THE ENTIRE PURCHASE PRICE WITHOUT ANY COMPENSATION FOR PLAINTIFF-APPELLEE'S USE OF THE VEHICLE, OR, INsofar AS POSSIBLE, RETURNING THE PARTIES TO THE STATUS QUO.

Plaintiff-Appellee's Second Amended Complaint (R-110) sets forth five causes of action against defendant-appellants Kim Edward Conover, Karen Jane Conover, and K & K Sales. In each count damages are requested.

There is no request in the Second Amended Complaint for a rescission of the contract of sale.

The only violations found by the court involved the Utah Consumer Sales Practices Act (13-11-1 et seq., UCA 1953, as amended.)

The only remedy provided a consumer in that act is an action for damages. (13-11-9(2), Supra.) There is no provision for rescission.

In its ruling the court stated:

Now, in terms of remedy, I think this is not in the nature of fraud and that's an equitable--usually the equitable remedy in a fraud case is rescission, and I think that's the most appropriate remedy in this case. Therefore, I'm going to order rescission and award judgment to the plaintiff in the amount that she paid for the car, which is \$7,175 and then she will be required to return the automobile---
(Ruling of the Court Pg. 4)

When the court made the above ruling, the defendant moved that the court comply with the rules of equity in rescission cases,

grant defendants compensation for plaintiff's use of the subject vehicle, and, in-so-far as possible, return the parties to the status quo. Defendant filed an affidavit of Richard Warner stating the lease value for the period plaintiff used the subject vehicle, together with an affidavit of Kim Conover concerning the condition of the subject vehicle. (R. 173, 185, 193, 195)

Defendant's motion was not granted by the court.

As cited to the trial court (R. 174), an article in Corpus Juris Secundum, Volume 12A at page 724, discusses the equitable principles involved in a rescission. Citing numerous authorities (which are omitted), the article states:

Generally, the person seeking cancellation or rescission will not be allowed to derive any unconscionable advantage from the cancellation, and subject to some limitations and exceptions, the general rule is that plaintiff must, as a condition to his obtaining relief, restore defendant as far as possible to the position which he occupied before the transaction which is sought to be rescinded. The basis for this rule is that the remedy of cancellation, like other forms of equitable relief, is subject to the MAXIM that he who seeks equity must do equity, and equity will not assist one who repudiates his contract but retains its benefits.

Restoration of status quo means the return of, or offer to return, that which has been received, such as consideration, and all benefits and profits which plaintiff may have realized from the transaction.

The rule requiring restoration is the same with respect to both real and personal estate, and applies irrespective of the ground on which cancellation is sought, be it for fraud, mistake, misrepresentation, duress, nonperformance, undue influence, or want or failure of consideration.

In a 1984 case (Horton v. Horton, 495 P.2d 102), the Utah Supreme Court enunciated the above cited principles of equity. At page 107 the court stated:

It is not the intent of equity actions such as this to punish a transgressor or to permit any party, whether innocent or not, to reap a benefit from the fraudulent transaction that he would not have reaped if the transaction had not taken place. The purpose of an equity action is to restore the parties to the status quo to the extent possible. (See also: Green Chevrolet Co. v. Kemp, Sup. Ct. Arkansas, 1966, 406 S.W. 2d 142; Heimerdinger v. Standard Motor Sales, Sup. Ct. Michigan, 1938, 281 N.W. 317; MacDavid Pontiac, Inc. v. Nix, App. Ct. Tex., 1984, 681 S.W. 2d 831; Bezner v. Continental Dry Cleaners, Inc., Sup. Ct. Utah, 1976, 548 P.2d 898)

In this case plaintiff used the subject vehicle for over a year and drove it over 14,000 miles. It was error for the court to order a rescission without awarding defendant compensation for the benefit plaintiff received, and attempting, insofar as possible, to restore the parties to the status quo.

POINT IV

THE COURT ERRED IN GRANTING PLAINTIFF ATTORNEY'S FEES FOR WORK DONE ON FIVE CAUSES OF ACTION WHEN THE COURT ONLY FOUND FOR PLAINTIFF ON ONE CAUSE OF ACTION.

In this matter, plaintiff filed a complaint, an amended complaint, and a second amended complaint. (R. 2, 74, 110) Each set forth different, or additional, causes of action.

In none of the causes is an award made for attorney's fees if a plaintiff is not successful. This includes the Motor Vehicle Information and Cost Saving Act of 1972. (15 U.S.C. 1981 et seq., at Section 1989.)

In theory, if a plaintiff is allowed to recover attorney's fees for work on multiple causes of action in situations where he only prevails on one he could allege a hundred causes and claim horrendous fees.

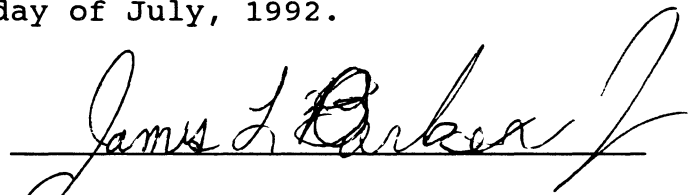
The court should have granted defendant's motion to require plaintiff to disclose the time spent on the successful cause and disallow fees for causes on which plaintiff-appellee was not successful.

CONCLUSION

This court should dismiss plaintiff's complaint for no cause of action and should vacate the amended judgment entered against defendants.

In the alternative (if the judgment is sustained) this court should remand this matter to the Third District Court with instructions to apply the rules of equity to the ordered rescission, to avoid unjustly enriching plaintiff, and, insofar as possible, return the parties to the status quo.

DATES this 27 day of July, 1992.


James L. Barker, Jr.
Attorney for Defendant-Appellants