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Car dealership liable for misrepresenting vehicle odometer readings

by Elizabeth Abbene

In *S & S Toyota, Inc. v. Kirby*, 649 So.2d 916 (5th Dist. 1995), the District Court of Appeals of Florida held that an award of punitive damages was proper where evidence at trial established that a car dealership knew or should have known that the actual mileage and usage of a used-car was far in excess of the mileage on the odometer. Further, the court held that a jury award of treble damages under the federal odometer law was proper because the jury found that the car dealership's conduct showed reckless indifference to the rights of others. Finally, the court found that a remittitur or new trial on the issue of compensatory and punitive damages was proper absent a clear showing of abuse of discretion.

Odometer Reading Clearly Inaccurate in Light of Evidence

In February, 1990 Carrie Kirby purchased a 1984 Datsun 300 ZX from S & S Toyota ("Toyota") for over \$10,000. Toyota represented the vehicle as a "one owner, low mileage" used-car with 26,000 miles. In fact, the vehicle had six prior owners. Additionally, the certificate of title which the previous owners transferred to Toyota revealed that the odometer reading was inaccurate. Subsequently, Kirby filed suit against Toyota and claimed that it had misrepresented the mileage on the vehicle. Kirby sought

compensatory and punitive damages, attorney's fees, and treble damages under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. 1901-1991.

Following a two-day trial, the jury found Toyota guilty of a negligent misrepresentation and awarded Kirby \$15,000 in compensatory damages and \$35,000 in punitive damages. Both parties filed post-trial motions. The court denied Kirby's motion requesting treble damages under the federal odometer law because Kirby had waived this claim when she elected to proceed solely on the common law fraud claim. Toyota filed motions for a directed verdict and for a new trial, both of which were denied. Toyota also filed a motion for a remittitur on the amount of compensatory and punitive damages awarded. A remittitur results in the plaintiff remitting a portion of a money damage award which is found to be excessive as a matter of law. The court granted Toyota's motion for remittitur. Kirby, however, did not accept the remittitur ruling and the court granted a new trial on the issue of damages. Both parties filed appeals from these orders and the court of appeals subsequently considered the issues.

Toyota argued that there was insufficient evidence to sustain an award of punitive damages and, therefore, the trial court was incorrect in denying its motions for a directed verdict or a new trial on this issue. According to the court, in

order to support an award of punitive damages, the character of the defendant's conduct must be fraudulent, malicious, deliberately violent or oppressive; or committed with such gross negligence as to indicate a wanton disregard for the rights of others. In this case, the jury was properly instructed and could award punitive damages if Toyota's conduct was of such character. Toyota maintained, however, that there was no special interrogatory finding at trial that it had acted with fraud, malice, deliberate violence or oppression or such gross negligence as to indicate a wanton disregard for the rights of others. Furthermore, Toyota argued that because there was no special interrogatory finding at trial, the trial court was prohibited from supporting the award of punitive damages. The appellate court explained that the burden of introducing the special interrogatory findings was Toyota's. Thus, because Toyota had failed to meet its burden, the appellate court held that the trial court was correct in affirming the award of punitive damages.

Punitive Damage Award Appropriate Where Mileage and Usage of Vehicle Was Clearly in Excess of Mileage on Odometer

The evidence at trial revealed that the car had been repainted and had experienced mechanical problems. Also, an expert witness testified that these factors were indicative of a

vehicle with mileage at least twice the mileage shown on the odometer. Moreover, the vehicle's condition coupled with the certificate of title indicating that the odometer reading was inaccurate was sufficiently within Toyota's expertise. The court held that the jury could draw any reasonable inference from the evidence to find that Toyota's conduct showed reckless indifference to Kirby's rights and, thus, an award of punitive damages was proper.

Treble Damages Appropriate Under the Motor Vehicle Information and Cost Savings Act

On appeal, Kirby argued that the trial court erred in its finding that the Motor Vehicle Information and Cost Savings Act required a specific intent to defraud. The trial court had held that there was no basis to award damages since Kirby did not request a specific interrogatory finding. Section 1988 of the statute reads in part:

(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 greater; and

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

In examining the intent to defraud language, the appellate court looked to both the case law and the legislative history of the federal odometer law. In determining whether a particular violation

Loans fall within definition of merchandise under

by Cary Latimer

In *Boubelik v. Liberty State Bank*, 527 N.W.2d 589 (Minn. Ct. App. 1995), the Minnesota Court of Appeals held that the general jury instructions given in a fraud action did not contradict the special verdict form. The court also held that the trial court did not err in rejecting the defendant's motion for judgment notwithstanding the verdict. Furthermore, the court held that a loan fell within the definition of "merchandise" under the Minnesota Consumer Fraud Act ("the Act"). Thus, the trial court erred in dismissing the respondent's claim under the Act.

Consumer Fraud Act claim dismissed

Joseph Baker ("Baker") advised the respondent, Henry F. Boubelik ("Boubelik") to borrow \$75,000 from Liberty State Bank ("Liberty") in order to invest in a business operated by Baker. Baker owed over \$350,000 in loans to Liberty, and Liberty's representative, John Wittek, knew of Baker's financial situation. At Baker's request, Wittek granted the loan to Boubelik on the condition that Baker would use Boubelik's investment to pay off some of Baker's outstanding debt with Liberty.

Subsequently, Baker's business failed, and Liberty commenced a foreclosure action on Boubelik's collateral.

Boubelik, claiming fraud in connection with the loan, brought an action against Liberty. The trial court found that a loan was not "merchandise" under the Act and dismissed Boubelik's claim. The trial court allowed the general fraud claim to go to trial, and the jury awarded Boubelik \$123,431 in damages.

Boubelik, claiming that loans are included in the Act's definition of merchandise, appealed. Liberty also appealed, alleging that the jury instructions contradicted the special verdict form and that the trial court should have granted its motion for a judgment notwithstanding the verdict.

Instructions do not contradict special verdict form

On appeal, Liberty argued that the jury instructions and the special verdict form did not have consistent definitions of fraud. Liberty first cited the jury instructions, which required Liberty to have "actual knowledge" of Baker's fraudulent activities. Liberty then claimed that the "actual knowledge" standard was inconsistent with the special verdict form, which

amounts to an intent to defraud, the majority of courts are in agreement that actual knowledge of an inaccurate odometer reading is not necessary. Constructive knowledge or reckless disregard for the truth is sufficient. The legislative history is consistent with the majority of courts. If the seller lacks actual knowledge but in the exercise of reasonable care he would have known that the odometer reading was different than the actual mileage, then he is liable under the act. The court held that because the jury found that there was a misrepresentation on the part of Toyota and that

Toyota's conduct showed reckless indifference to the rights of others an award of treble damages and attorney's fees was proper under the federal odometer law.

Remittitur Proper on the Issue of Compensatory and Punitive Damages

Kirby also argued on appeal that the trial court erred in granting Toyota's motion for remittitur and the court should have allowed the \$15,000 compensatory damage award to stand. On appeal, however, the court held that absent a clear

showing of abuse of discretion on the part of the trial court, the remittitur on compensatory and punitive damages should stand. Kirby did not produce any evidence supporting her contention that the trial court abused its discretion or that there was any support for the jury's award of \$15,000 in compensatory damages. Therefore, the court affirmed the trial court's determination that a remittitur on compensatory and punitive damages was proper.

the Minnesota Consumer Fraud Act

instructed the jury to find Liberty liable if the jury found Liberty knew or should have known of Baker's fraudulent activities.

The court disagreed with Liberty. The court declared that the jury instructions must be read as a whole, and found that the jury instructions were not confusing or misleading to the jury when read as a whole. The court also determined that, even if a slight inconsistency did exist, the inconsistency was not fundamental and thus did not amount to reversible error. The court found it relevant that Liberty's counsel did not object to the jury instructions; in fact, Liberty's counsel had stated that the instructions were satisfactory, constituting a waiver of Liberty's right to object to the instructions. Therefore, the instructions did not amount to reversible error.

The court also held that the trial court's refusal to grant judgment notwithstanding the verdict was proper. The court found that the jury, given Wittek's testimony that the loan was granted on the condition of paying off Baker's other debts, reasonably could have determined that Wittek knew of Baker's poor financial condition. Therefore, the court held that a reasonable jury had sufficient evidence to find that the activities of Baker and Liberty were fraudulent.

Definition of Act includes loans

Boubelik argued that the trial court erred in determining that a "loan" was not included in the Act's definition of "merchandise." Boubelik asserted that "merchandise" included "services," and that loans constitute services. The court agreed with Boubelik. Although the Minnesota courts had not yet determined whether a loan constituted a service, the court looked to the decisions in other states. The court noted, for instance, that both Pennsylvania and Montana consider loans to be a service. The court then considered the nature of a loan, and determined that a loan is essentially nothing more than the sale of money, and the sale of money is a service. Finally, the court noted that the Act is remedial in nature and should be construed liberally in favor of consumers.

The court affirmed the trial court's ruling on the jury instructions and denial of petitioner's motion for judgment notwithstanding the verdict. The court remanded the respondent's fraud claim for further proceedings under the Act.