[Cite as *Barnett-McCurdy*, 2008-Ohio-4874.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 90467 and 90469

LATIA BARNETT-McCURDY

PLAINTIFF-APPELLANT

vs.

KEVIN HUGHLEY, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Civil Appeals from the
Cuyahoga County Court of Common Pleas
Case No. CV-601946

BEFORE: Rocco, J., Gallagher, P.J., and Boyle, J.

RELEASED: September 25, 2008

JOURNALIZED:

[Cite as *Barnett-McCurdy*, 2008-Ohio-4874.]

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

KENNETH A. ROCCO, J.:

{¶ 1} In these consolidated[1] appeals, plaintiff-appellant, Latia Barnett-McCurdy, challenges common pleas court orders granting summary judgment in favor of R&C Auto Sales, Inc. and Deano Bevelacqua (Appeal No. 90467) and Atlas Transmission (Appeal No. 90469). She asserts that genuine issues of material fact precluded summary judgment for any of these parties.

{¶ 2} We find that, viewing the evidence in the light most favorable to appellant, there were no genuine issues of material fact and Atlas was entitled to judgment as a matter of law. Likewise, R&C and Bevelacqua were entitled to judgment as a matter of law on appellant's claims for breach of contract, breach of warranty, violation of the Consumer Sales Practices Act and violation of the Magnuson-Moss Warranty Act. However, genuine issues of material fact precluded judgment for R&C and Bevelacqua on appellant's tort claims. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

Procedural History

{¶ 3} Appellant filed her complaint in this case on September 21, 2006; a second amended complaint was filed April 30, 2007. In the second amended

[1]Despite our order to file a consolidated brief, appellant filed separate briefs in the two appeals, substantially defeating one of the purposes of the consolidation order. Nevertheless, we address the two appeals together, because they arise from a single series of related transactions. See Loc. App.R. 3(C)(1) of the Eighth District Court of Appeals.

complaint, she alleged that she purchased a 1997 Cadillac Catera for $4595 from Kevin Hughley, who held himself out as a salesman and agent for appellees R&C Auto Sales, Inc. and Deano Bevelacqua. She also purchased a limited warranty from the Eagle Warranty Company through Judy Simone and J&B Detail, Inc. The "Buyer's Order" listed J&V Auto Wholesale and/or J&B Auto Wholesale as the dealer,[2] but a later "Used Vehicle Order" listed the dealer as J&B Detail.

{¶ 4} Appellant observed some "shakiness" in the vehicle when she test drove it prior to her purchase. Hughley advised her that the vehicle needed "minor repairs," which would be performed before she picked it up. She made full payment before the vehicle was delivered to her; she was not given the title. Both Hughley and Bevelacqua were present when she took delivery of the vehicle. Hughley provided her with a copy of a paid invoice from Custom Tran, presumably for repairs performed on the vehicle.

{¶ 5} Appellant observed mechanical difficulties with the Catera and called Hughley, who told her to call Judy Simone of J&B Detail. Simone told appellant to take the Catera to Atlas Transmission for repair. Atlas told appellant that the warranty she had purchased would not cover any of the

[2]Simone, J&B Detail, Eagle Warranty, J&V Auto Wholesale and J&B Auto Wholesale were also defendants in the underlying action. They are not parties to this appeal.

required repairs. Neither the Catera nor the title nor the purchase money were returned to appellant.

{¶ 6} In section IV of her second amended complaint, appellant asserted that Hughley, Bevelacqua, and R&C (as well as J&V Auto Wholesale and J&B Detail) engaged in fraud, intentional or negligent misrepresentation, breach of contract, breach of warranty, and violations of the Consumer Sales Practices Act and the Magnuson-Moss Warranty Act by:

- selling her a vehicle as which they knew they could not deliver title;
- selling a vehicle as to which they did not have and could not obtain the certificate of title;
- selling the vehicle at a price they knew exceeded the reasonable market value by a substantial margin, so that the consumer would not receive a substantial benefit from it;
- selling her a vehicle knowing that it had significant electrical and mechanical defects and would fail to operate
- selling her a vehicle knowing that the mileage listed was inaccurate;
- misrepresenting all of the above to appellant; and
- failing to provide her with a Buyer's Guide as required by 16 C.F.R. 455.

In section II of her complaint, appellant alleged that R&C and Bevelacqua intentionally or negligently held Hughley out as their agent and therefore they were liable for Hughley's acts. In Section III, she alleged that J&V Auto Wholesale and J&B Detail were vicariously liable for Hughley's acts. Section V claimed Atlas Transmission failed to provide appellant with certain required disclosures, failed to inform her of her right to receive an oral or written estimate, failed to obtain her

authorization to make repairs, charged her for unauthorized repairs, and failed to itemize the repairs performed, as required by Ohio Admin. Code 109:4-3-13. Appellant also alleged that Atlas violated the Consumer Sales Practices Act and wrongfully exercised dominion and control over the vehicle in a manner inconsistent with her rights, and therefore converted the vehicle. Finally, section VI claimed that all defendants had caused her emotional distress.[3]

{¶ 7} R&C, Bevelacqua and Atlas all answered, denying the essential allegations of the complaint and asserting a number of affirmative defenses.

{¶ 8} Atlas and R&C and Bevelacqua filed motions for summary judgment. Attached to R&C and Bevelacqua's motion was an excerpt from appellant's deposition as well as the "buyer's order" and "used vehicle order." Atlas's motion was accompanied by excerpts from the depositions of appellant and Irene Bogdan, Atlas's operations manager.[4] Atlas also included the work order signed by appellant, the unclaimed vehicle affidavit it filed with the Bureau of Motor Vehicles, its application for a certificate of title, and the certificate of title issued to it. Appellant's briefs in opposition included admissions by Hughley, appellant's affidavit, an odometer disclosure, various documents concerning the transfer of title from R&C Auto Sales to Atlas, Atlas's answers to interrogatories, and an affidavit from

[3]The second amended complaint also asserted claims against Simone, J&B Auto Detail, and Eagle Warranty not relevant to this appeal.

[4]The complete transcripts of both appellant's and Bogdan's depositions were filed separately with the court.

appellant's attorney concerning correspondence with Atlas's counsel. This evidence will be discussed in connection with the appellant's assignments of error.

{¶ 9} The trial court granted both Atlas's and R&C and Bevelacqua's motions on July 5, 2007. Claims against other defendants were subsequently dismissed; final judgment was entered on August 29, 2007. This appeal followed.

Law and Analysis

{¶10} In Appeal No. 90467, appellant urges that the court erred by granting summary judgment in favor of R&C and Bevelacqua. She claims that these defendants allowed Hughley to sell vehicles from their premises, raising genuine issues of material fact whether Hughley was their apparent agent and whether they were estopped from denying that Hughley was their agent. Appellant contends that this agency relationship would have allowed these defendants to be held liable for Hughley's violations of the CSPA, the Magnuson-Moss Warranty Act "and other causes of action under tort law."

{¶11} "In order for a principal to be bound by the acts of his agent under the theory of apparent agency, evidence must affirmatively show: (1) that the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted him to act as having such authority, and (2) that the person dealing with the agent knew of those facts and acting in good faith had reason to believe and did believe that the agent possessed the necessary authority." *Master Consol. Corp. v. BancOhio Nat'l Bank* (1991), 61 Ohio St.3d 570,

syllabus. "[E]stoppel is essentially the principle that a person must compensate another for any change of position (loss) induced by reliance on what the person said or otherwise manifested, because it would be unjust to allow him to deny the truth of his words or manifestations." Id. at 577. "Under either doctrine, the principal must somehow represent to a third party, either intentionally or negligently, that the agent had authority to act on the principal's behalf." *Medina Drywall Supply, Inc. v. Procom Stucco Sys.*, Medina App. No. 06CA0014-M, 2006-Ohio-5062, ¶10.

{¶12} Although appellant never spoke with Bevelacqua, Bevelacqua saw Hughley escorting appellant on R&C's lot and showing her vehicles. Hughley also had access to keys to allow appellant to test drive a vehicle. These facts tend to show that R&C and Bevelacqua represented to appellant that Hughley was acting on their behalf. On the other hand, the fact that the contracts were made between appellant and J&V or J&B Auto Wholesale and J&B Detail tend to show that Hughley was acting on behalf of these defendants. Thus, the relationships among Bevelacqua, R&C, Hughley, J&V or J&B Auto Wholesale, and J&B Detail present questions of fact not easily squared with the statutes governing automobile dealerships and salespersons.

{¶13} The intriguing and complicated factual questions about the relationships among these defendants are not material to most of appellant's claims, however. In her deposition testimony, appellant conceded that she did not have a contract with

either R&C or Bevelacqua.[5] Lacking any privity of contract with appellant, R&C and Bevelacqua cannot be liable for breach of contract or breach of warranty under Ohio law or the Magnuson-Moss Warranty Act. See *Curl v. Volkswagen of Am., Inc.*, 114 Ohio St.3d 266, 2007-Ohio-3609. Furthermore, R&C and Bevelacqua did not engage in any "sale . . . or other transfer of an item of goods . . . to an individual," so they were not "suppliers" in a "consumer transaction" under the CSPA. See R.C. 1345.01(A) and (C) and 1345.02. Therefore, we overrule appellant's assignment of error and affirm the judgment in favor of R&C and Bevelacqua on appellant's claims for breach of contract, breach of warranty, violation of the CSPA and violation of the Magnuson-Moss Warranty Act.

{¶14} The parties barely mentioned, much less addressed, appellant's tort claims for fraud, misrepresentation, and emotional distress. No contractual relationship is necessary to pursue these claims. As noted above, there are genuine issues of fact whether Hughley was acting as an agent for R&C and

[5]There is no evidence (or even an allegation) that J&V or J&B Auto Wholesale and/or J&B Detail were acting as agents for R&C and Bevelacqua, so that their contractual relationship to appellant could be attributed to R&C and Bevelacqua. Any multiple agency relationships among (1) Hughley, (2) R & C and Bevelacqua, and (3) J&V or J&B Auto Wholesale and/or J&B Detail, would raise serious concerns under the Ohio statutes governing automobile dealers. A dealer cannot be licensed to work as the salesperson for another dealer. R.C. 4517.14(F). Furthermore, a dealer must generally work from an established place of business devoted exclusively to the purpose of selling vehicles, and more than one dealer generally cannot share business premises. R.C. 4517.03 and 4517.24. The relationship between an automobile dealer and a salesperson is exclusive: a dealer generally may not sell vehicles through anyone other than a licensed salesperson, and a licensed salesperson can only work for one dealer at a time. R.C. 4517.14(E) and 4517.20.

Bevelacqua, and therefore, whether they may be liable for his tortious conduct. *Groob v. Keybank*, 108 Ohio St.3d 348, 2006-Ohio-1189, ¶42.

{¶15} Accordingly, we affirm the judgment in favor of R&C and Bevelacqua in part and reverse it in part and remand for further proceedings on appellant's tort claims.

{¶16} In Appeal No. 90469, appellant contends that the evidence demonstrates that Atlas converted her vehicle and violated the Consumer Sales Practices Act. "Conversion is the wrongful control or exercise of dominion over property belonging to another inconsistent with or in denial of the rights of the owner. In order to prove the conversion of property, the owner must demonstrate (1) he or she demanded the return of the property from the possessor after the possessor exerted dominion or control over the property, and (2) that the possessor refused to deliver the property to its rightful owner. The measure of damages in a conversion action is the value of the converted property at the time it was converted." *Tabar v. Charlie's Towing Serv.* (1994), 97 Ohio App.3d 423, 427-28 (citations omitted).

{¶17} Appellant's testimony shows that she never received a certificate of title to the Catera. After she learned that there were problems with the Catera's transmission, she called Hughley, who instructed her to call Simone. Simone, in turn, instructed appellant to contact Irene Bogdan at Atlas. The Catera stopped operating on the way to Atlas; appellant had to have it towed into Atlas's garage. Bogdan indicated that they would run diagnostic tests and appellant agreed.

Bogdan later called appellant to inform her that there was a problem with the transmission, and the warranty would not cover it. Appellant did not authorize Atlas to do any work. Instead, she called Hughley and told him that she wanted her money back. Hughley repeatedly assured her that "we'll take care of it."

{¶18} Ms. Bogdan testified that the vehicle was left on Atlas's premises and no one called about it, so she filed an unclaimed vehicle affidavit with the Bureau of Motor Vehicles. She learned through the Bureau of Motor Vehicles that R&C was the title owner. She did not contact appellant or her husband or Hughley and tell them to come and pick up the vehicle. After Atlas obtained title, Atlas installed a rebuilt transmission in the Catera.

{¶19} The evidence demonstrates that appellant was not the title owner of the vehicle but Atlas was, so appellant cannot claim that Atlas converted her property to its own use. Whatever equitable rights appellant may have had as against Hughley and any other person or entity involved in selling her the Catera, she did not acquire any right, title or interest in or to the vehicle because she never received the certificate of title. R.C. 4505.04(A); *Saturn of Kings Automall, Inc. v. Mike Albert Leasing, Inc.* 92 Ohio St.3d 513, 520, 2001-Ohio-1274. On the other hand, Atlas did obtain a certificate of title to the vehicle from R&C, the title owner, through an unclaimed vehicle affidavit before it performed repairs on the vehicle. *Rucker v. Alston*, Montgomery App. No. 19959, 2004-Ohio-2428, is inapposite; unlike Atlas,

the defendant in that case did not have title or any better claim to the vehicle than the plaintiff. Consequently, appellant has no claim for conversion against Atlas.

{¶20} Appellant claims Atlas violated the Consumer Sales Practices Act by failing "at the time of the initial face to face contact and prior to the commencement of any repair or service [where the anticipated cost exceeds twenty-five dollars], to provide the consumer with a form which indicates the dates, the identity of the supplier, the consumer's name and telephone number, the reasonably anticipated completion date and, if requested by the consumer, the anticipated cost of the repair or service." Ohio Admin. Code 109:4-3-13. The only service Atlas performed for appellant was the diagnostic test; there is no evidence that there was any charge for this. Appellant did not request any repairs, and none were performed on her behalf. Repairs were only made after title was transferred to Atlas. Therefore, this provision is inapplicable.

{¶21} Accordingly, we affirm the judgment in favor of Atlas. We further affirm the judgment in favor of R&C and Bevelacqua on appellant's claims for breach of contract, breach of warranty, violation of the CSPA, and violation of the Magnuson-Moss Warranty Act. However, we reverse the judgment in favor of R&C and Bevelacqua on appellant's tort claims and remand for further proceedings on those claims.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, JUDGE

MARY J. BOYLE, J., CONCURS
SEAN C. GALLAGHER, P.J., CONCURS IN PART AND DISSENTS IN PART (SEE ATTACHED CONCURRING IN PART AND DISSENTING IN PART OPINION)

SEAN C. GALLAGHER, P.J., CONCURRING IN PART AND DISSENTING IN PART:

{¶22}I respectfully concur in part and dissent in part from the majority opinion. I concur with the majority's determination that genuine issues of material fact exist as to whether Hughley was acting as an agent for R&C and Bevelacqua, and whether they may be liable for Hughley's tortious conduct. However, I dissent from the majority's finding that summary judgment was appropriate on appellant's remaining claims.

{¶23}I believe the majority correctly determined that the evidence in this case presents genuine issues of material fact as to whether R&C and Bevelacqua could be liable on the tort claims under an agency theory. Indeed, there was evidence that appellant met with Hughley at R&C's lot, that she selected the

vehicle she purchased from vehicles shown to her on R&C's lot, that R&C was the titled owner of the vehicle she purchased, that Hughley had the keys to that vehicle, that appellant test drove the vehicle from R&C's lot, and that she executed paperwork for the vehicle and paid for the vehicle at the premises of R&C.

{¶24} While the majority concludes that genuine issues of fact remain as to whether Hughley was acting as an agent for R&C and Bevelacqua, and whether they may be liable for his tortious conduct, I believe the same holds true on the remaining claims. Although R&C and Bevelacqua were not named parties to any written contract in connection with the purchase of the vehicle, they could be bound by the contract executed by Hughley under an agency theory, apparent or otherwise. Accordingly, I believe summary judgment should have been denied on all of appellant's claims against R&C and Bevelacqua.

{¶25} I also dissent from the majority's finding that summary judgment was appropriate on the claims against Atlas. In rejecting appellant's conversion claim, the majority relies upon the fact that appellant was not the titled owner to the vehicle.

{¶26} The elements of conversion include "'(1) plaintiff's ownership *or right to possession* of the property at the time of conversion; (2) defendant's conversion by a wrongful act or disposition of plaintiff's property rights; and (3) damages.'" *Dream Makers v. Marshek*, Cuyahoga App. No. 81249, 2002-Ohio-7069, quoting *Haul Transport of Va., Inc. v. Morgan* (June 2, 1995), Montgomery App. No. CA 14859 (emphasis added). Here, although the title had not been transferred to appellant, she certainly held a property right in the vehicle she purchased. Further, there was evidence that Atlas's representative, Irene Bogdan, was informed that appellant had purchased the vehicle.

{¶27} Insofar as Atlas contends that appellant abandoned the vehicle, an abandonment is the "'relinquishing of a right or interest with the intention of never again claiming it.'" *Labay v. Caltrider*, Summit App. No. 22233, 2005-Ohio-1282, quoting Black's Law Dictionary (7th Ed. 1999). Here, there was evidence that appellant was in contact with Hughley and Judy Simone in an effort to get her money back. I believe this at least presents an issue of fact as to whether appellant had relinquished her interest in the vehicle as she was attempting to reach a resolution and obtain her money back, which potentially could have required a return of the vehicle.

{¶28} There is also an issue as to whether Atlas legally obtained title pursuant to R.C. 4501.101, which addresses certificates of title for abandoned vehicles. The statute applies to vehicles left unclaimed in a repair or place of

storage "following completion of the requested repair or the agreed term of storage." Here, neither appellant nor R&C requested Atlas to perform the repairs or agreed to a term of storage. The only service performed was diagnostic testing, at no charge, that revealed the transmission needed to be replaced. Thus, there is clearly a question as to the legitimacy of Atlas's title to the vehicle. See *State Farm Mut. Auto. Ins. Co. v. Advanced Impounding and Recovery Servs., Ltd.*, 165 Ohio App.3d 718, 2006-Ohio-760 (finding impounding service improperly used R.C. 4505.101 to obtain title where there was no request for repairs or agreed-to storage and the evidence did not show an abandonment of the car).

{¶29} Nevertheless, Atlas claims appellant made no demand for the vehicle back and did not interfere with Atlas's efforts to obtain title. The record reflects that Atlas sent the required notice under R.C. 4501.101(A) to R&C as the titled owner of the vehicle. No such notice was provided to appellant, despite Atlas's apparent knowledge of her recent purchase of the vehicle. Also, this court has recognized: "Although a demand and a refusal to return the property is ordinarily necessary to prove conversion, acts by a defendant which are inconsistent with the right of the plaintiff's ownership are sufficient to satisfy this requirement." *Tinter v. Lucik*, 172 Ohio App.3d 692, 700, 2007-Ohio-4437,

citing *Ohio Tel. Equip. & Sales, Inc. v. Hadler Realty Co.* (1985), 24 Ohio App.3d 91, 93.

{¶30} Upon the record in this case, I believe that summary judgment should have been denied on appellant's conversion claim against Atlas, as well as her claim that Atlas violated the CSPA.

{¶31} For the foregoing reasons, I would reverse the trial court's summary judgment rulings and remand the matter for further proceedings.