COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2005-SC-0999-DG
C/W NO. 2006-SC-432-DG

CRAIG & BISHOP, INC.,
d/b/a SONNY BISHOP CARS — APPELLANT/CROSS-APPELLEE

VS.

APPEAL FROM JEFFERSON CIRCUIT COURT
NO. 2003-CI-7221
COURT OF APPEALS
NO. 2004-CA-1883-MR

CHRISTY PILES,
CHARLES WARNER
AND ELLEN G. FRIEDMAN — APPELLEES/CROSS-APPELLANTS

** ** ** ** ** **

BRIEF FOR APPELLANT CRAIG & BISHOP, INC.

** ** ** ** ** **

Submitted by:

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of this brief was served by U.S. Mail, postage prepaid upon: Hon. George M. Geoghegan, III, Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, Kentucky 40601-9229; Hon. Steve Mershon, Judge, Jefferson Circuit Court Division Seven (7), 700 West Jefferson Street, Louisville, Kentucky 40202; and Hon. Ellen G. Friedman, 125 South Sixth Street, Louisville, Kentucky 40202, this 16th day of October, 2006.

FRED E. FISCHER
JOSEPH MICHAEL KELLY

INTRODUCTION

This case involves claims of breach of contract, fraud, conversion and violation of the Consumer Protection Act arising from a sales transaction that was never completed. The primary issue on appeal is the application of the Consumer Protection Act to situations in which no purchase or lease of goods or services in consummated.

STATEMENT CONCERNING ORAL ARGUMENTS

Appellant respectfully requests the opportunity to present oral arguments, and believes it would be helpful to the Court for the attorneys to be present to answer any questions concerning issues of first impression.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

MAY IT PLEASE THE COURT:

This case involves a series of events which began in late June, 2003, when Christy Piles and Charles Warner, (Appellees) who were dating at the time, came to one of the two car lots operated by Craig & Bishop, Inc. d/b/a Sonny Bishop Cars (Appellant, hereafter referred to as Sonny Bishop Cars) looking for a vehicle to purchase for Mr. Warner. They were taken to the other lot, and after looking at a couple of vehicles, settled on a 2000 Camaro. (TAPE No. 1; 8-4-04; 10:03:10 to 10:09:00). Mr. Warner did not qualify for any financing to purchase the vehicle, (TAPE No. 1; 8-3-04; 13:45:00 to 13:45:35) so Piles and Warner decided that Piles would buy the vehicle and obtain financing in her name, and Warner would trade in his 1997 Nissan Sentra and be the primary driver of the vehicle. (TAPE No. 2; 8-4-04; 10:37:30 to 10:38:00).

Piles testified that prior to any documents being signed they were promised by the sales representative that the vehicle would be financed at no more that 8% interest for no more than 5 years, and monthly payments would be $250.00 or less. (TAPE No. 2; 8-4-04; 13:28:20 to 13:30:35). She also testified that prior to signing any documents they were both aware that the sales representative was not in charge of finance, and that Pam, the manager, was the only one who could approve financing. (TAPE No. 2; 8-4-04; 14:13:15). They both also testified that by agreement with the sales representative, Warner's trade-in vehicle would have a value of $1,000.00 to be deducted from the sales price. (TAPE No. 2; 8-4-04; 10:39:15 to 10:40:05).

The sales representative denied any involvement with the financing and testified that Pam was in charge of finance and he, the sales person, had no authority or control over

finance. (TAPE No. 1; 8-03-04; 15:50:38 to 15:51:15). By this time, however, it was getting late in the evening, and Pam had gone home for the day. She was called at home, and after speaking with Ms. Piles and discussing her credit report with the sales person, Pam approved the sale of the vehicle to Ms. Piles even though no financing agreement had been reached. (TAPE No. 1; 8-3-04; 13:40:15; 14:17:00 to 14:18:55).

That same evening, Ms. Piles testified that she signed the following documents: (1) a Vehicle Purchase Agreement; (2) a Buyers Guide marked "AS IS-NO WARRANTY"; (3) an Affidavit of Spot Delivery; (4) an Odometer Disclosure Statement; (5) a "We Owe" document stating "no work promised"; (6) a Title Lien Statement; and (7) a Proof of Insurance document. Mr. Warner also signed over title to the Nissan to Sonny Bishop Cars. (Trial Exhibits p. 7-14). The two documents at the heart of the litigation, were the Vehicle Purchase Agreement (Trial Exhibit p. 7) and the Affidavit of Spot Delivery, (Trial Exhibit p. 8) marked as Appendix Exhibits 5 and 6 respectively. The total cash price was $14,983.50, and a used car allowance of $1,000.00 for Mr. Warner's 1997 Nissan Sentra left $13,983.50 due on the vehicle. Ms. Piles drove away in the Camaro, and the trade-in vehicle was left with Sonny Bishop Cars.

Of particular relevance to this appeal, the Vehicle Purchase Agreement provided just above Ms. Piles' signature, as follows:

> "ADDITIONAL TERMS
> ...B) (3) DELIVERY AND SALE OF VEHICLE TO BUYER ARE SOLELY ON A CASH BASES. Buyer acknowledges that neither this agreement, delivery of said vehicle, nor efforts by Seller to assist Buyer in securing financing for the purchase price constitute either an extension of credit or an agreement to extend credit to the Buyer by Seller...
> (c) This VEHICLE PURCHASE AGREEMENT constitutes the entire agreement between the parties and cannot be changed by an oral promise or representation, or modified in any manner unless in writing and signed by both parties. BUYER ACKNOWLEDGES THAT NO ORAL PROMISES OR REPRESENTATIONS

HAVE BEEN MADE PRIOR TO THE EXECUTION OF THIS AGREEMENT WHICH HAVE NOT BEEN INCORPORATED HEREIN IN WRITING.

Buyer hereby certifies that he (she/they) is (are) over the age of 18 years and has (have) read, understand(s), and agree(s) to the above terms..." (all caps in original). (Trial Exhibit p. 7)

The Affidavit of Spot Delivery provides, in pertinent part, as follows:

"I Christina Piles, do understand that I am taking possession of this vehicle
(TRANSFEREE)
prior to approval from the financial institution. I further understand that by taking possession of this vehicle I have agreed to its purchase at the price agreed upon by myself and the transferor as shown below.

I give transferor authorization to investigate my credit and place the contract with the lender of their choosing. I understand that if the transferor is unable to obtain credit approval on my loan within three (3) business days, and if I am unable to obtain financing of my own within 24 hours after notification from transferor that loan has been denied, I will be required to return the vehicle to the transferor..." (Trial Exhibit p. 8).

Conspicuously absent from any document signed by Ms. Piles was any mention of monthly payments, interest rates, or length of any loan.

Over the course of the next two days, Pam tried to obtain financing for Ms. Piles. She was outright rejected by one lender, but another agreed to lend her $10,000.00, and at Pam's request later agreed to finance $11,000.00. (Trial Exhibit p. 6). Pam then spoke with Mr. Warner and told him that they would need to come up with additional money to make up the difference between the balance due and the amount of financing available. (TAPE No. 1; 8-3-04; 14:20:00 to 14:20:50).

It was then explained to Pam, as it had been explained to the sales person on the evening of June 30th, that the only down payment possible was the trade-in vehicle, and they could not come up with any additional money. (TAPE No. 2; 8-4-04; 10:45:15 to 10:46:00). Piles then stated that she wanted out of the deal. Pam then offered for Sonny Bishop Cars to finance the remaining balance, and Piles again stated that she wanted out

of the deal. Finally, Pam offered to simply forget about the remaining balance, and allow Piles to keep the Camaro for the amount which could be financed- a $3,000.00 savings to Ms. Piles. The offer was also rejected. (TAPE No. 2; 8-4-04; 14:30:25 to 14:31:05).

At no time throughout these discussions did Ms. Piles inquire as to the interest rate, monthly payments or length of financing. At no time did she ever even attempt to secure financing on her own. (TAPE No. 2; 8-4-04; 14:29:50 to 14:30:25). Instead, she and Warner drove the Camaro to the car lot and requested the return of the trade-in vehicle. According to them, they were told that it would be no problem, and they could come back the next day to get the keys to the Nissan. When they returned, they were told that the Nissan had already been sold to a wholesaler. A heated discussion took place, culminating in Pam threatening to call the police. (TAPE No. 1; 8-3-04; 14:33:30 to 14:35:50). Piles and Warner left the lot, and returned the Camaro the next day with a letter from their attorney. (Trial Exhibit p. 19). Litigation was commenced shortly thereafter.

The Complaint alleged fraud, breach of contract, violation of the Consumer Protection Act, and conversion. Compensatory and punitive damages were claimed. (Record Appeal, Vol. I, p. 1-14). Eventually, Sonny Bishop Cars counterclaimed for breach of contract. (Record on Appeal, Vol. I, p. 34-39).

At the pretrial conference Sonny Bishop Cars filed a motion in limine to exclude from the evidence any testimony of oral statements which contradicted the written terms of the documents signed by Ms. Piles. (Record on Appeal, Vol. I, p. 94-97 TAPE 7-30-04; 13:15:50 to 13:25:51). The motion was overruled. It also moved in limine to exclude expert testimony under the "usage of trade" [as defined by KRS 355 1-206 (2)] exception

to the parole evidence rule which it believes contradicted the written documents, and to further limit the experts' testimony to the information provided in Plaintiff's expert witness disclosure. (Record on Appeal, Vol. I, p. 94-97; Vol. I, p. 64-69). The motions in limine were denied.

The case proceeded to trial, during the course of which the testimony sought to be excluded by the above motions in limine was presented to the jury. In addition, a juror's question was asked of Mitchell "Sonny" Bishop (over counsel's objection) relating to requirements under federal law for disclosure of financing terms within so many days of a "sale". (Record on Appeal, Pages of Notes; TAPE No. 2; 8-4-04; 16:48:25 to 16:52:10). The next day, which was the last day of trial, the Court read to the jury the federal statute relating to required disclosures prior to execution of a "retail installment contract", again over objections of counsel. (TAPE No. 3; 8-5-04; 10:15:20 to 10:16:00; 11:14:00 to 11:14:47).

The parties made their directed verdict arguments, which were overruled, (TAPE No. 2; 8-4-04; 14:53:30 to 15:14:45) and the case was submitted to the jury. The jury received the Court's instructions, discussed in detail later, after which a verdict was returned. Specifically, the jury found that the parties did not enter into a binding contract, meaning that there was no "sale" or "purchase" of the vehicle. It then found for Mr. Warner on his claim for conversion of the Nissan (if there was no sale or purchase, there could be no trade-in, and Sonny Bishop Cars therefore had no right to dispose of the Nissan) and awarded him $2,000.00; found for Mr. Warner and Ms. Piles on their claims of violation of the Consumer Protection Act and fraud, and awarded damages of $2,100.00 for loss of use of the vehicle, $3,000.00 for "inconvenience" of Mr. Warner,

and $1,500.00 for "inconvenience" of Ms. Piles, and further awarded $50,000.00 in punitive damages. (Record on Appeal, Vol. II, p. 142-159). The Plaintiffs then filed a post-trial motion for an award of attorney fees as the "prevailing party" on the Consumer Protection Act claim, and the Court awarded $22,662.50. (Record on Appeal, Vol. II, p. 168-192; 218-219). Their attorney, Hon. Ellen Friedman, is therefore also a named Appellee.

Sonny Bishop Cars believed the instructions given to the jury were erroneous, the jury's verdict was inconsistent, and the damages awarded were excessive. It filed a motion to alter, amend or vacate, and a motion for a new trial. The motions were overruled, an appeal was filed with the Court of Appeals, and a supersedeas bond was posted.

The Court of Appeals rendered an Opinion Affirming In Part and Vacating In Part (not to be published) on November 18, 2005. The Court of Appeals vacated the jury verdict as to fraud, concluding that the salesman's promise as to the loan and interest rate were not statements as to a past or existing fact, an essential element of fraud. It also vacated the verdicts awards for "inconvenience" to Piles and Warner, concluding that such damages were duplicative of the award for loss of use of the vehicle.

However, the Court of Appeals affirmed the verdict that Sonny Bishop Cars had violated the Consumer Protection Act, even though the jury found that there had been no actual purchase or sale of the vehicle. The Court of Appeals misstated the position of Sonny Bishop Cars that the Consumer Protection Act extends protection only to those who "purchase or lease goods or services", and cast the argument as being whether Piles and Warner were "consumers". It then concluded then even though there was no actual

"purchase" of the vehicle, Piles and Warner were nevertheless "consumers", and that "consumers" are afforded protection under the Act. Finally, it determined that the salesman's statements as to financing were misrepresentations as to a future fact, and that the Consumer Protection Act provides a cause of action for misrepresentations of future facts. It therefore affirmed the jury verdict for violation of the Consumer Protection Act, the award of attorney fees to the "prevailing party", and the punitive damages award.

The Court of Appeals also rejected the argument of Sonny Bishop Cars that the instruction given on punitive damages was defective because it interjected criteria for a gross negligence instruction, i.e. "reckless indifference to their rights" in addition to "fraud" and "oppression".

ARGUMENTS

I. THE CONSUMER PROTECTION ACT DOES NOT APPLY TO PERSONS WHO DO NOT PURCHASE OR LEASE GOODS OR SERVICES.

This issue was preserved for review by the Appellant's Memorandum in Support of Motion to Alter, Amend or Vacate Judgment, pointing out the inconsistencies in the jury verdict. (Record on Appeal, Vol. II, p. 198-206).

The Kentucky Consumer Protection Act, KRS 367.220, provides in pertinent part as follows:

> "Action for recovery of money or property- When action may be brought- (1) Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by KRS 367.170, may bring an action under the Rules of Civil Procedure in the circuit court in which the seller or lessor resides or has his principal place of business or is doing business, or in the circuit court in which the purchaser or lessee of goods or services resides, or where the transaction in question occurred, to recover actual damages."

(Emphasis added).

In the present case, the jury found that there was no contract between the parties, and therefore no sale or purchase of the vehicle. Since there was no sale or purchase, Piles and Warner were not "purchasers or lessors" of the vehicle.

Sonny Bishop Cars maintains that the clear, unambiguous language of the statute creates a cause of action only for those who "... purchase or lease goods or services...", and that since Piles and Warner are neither, they are not in the protected class.

This argument was presented to the Court of Appeals at Argument III of the Brief for Appellant, and was addressed by the Court of Appeals beginning at p. 10 of its Opinion.

Unfortunately, the Court of Appeals misapprehended the Appellants' argument, stating at p. 10:

> "Sonny contends that Warner and Piles were not 'consumers' and thus do not fall within the class intended to be protected..."

With all due respect, Appellant has never even addressed the question of whether Piles and Warner are "consumers", because the legislature did not create a cause of action for "consumers". Instead, it created a cause of action for those who "purchase or lease", a class far more restricted then the entire world of "consumers."

Although "purchasers" and "consumers" are not given specific definitions for their use in KRS 367.220, the words are defined elsewhere in commercial statutes. In KRS 355.1-201 (33), the legislature defined "purchaser" as meaning "a person who takes by purchase." (Emphasis added) The term "purchase" is defined as including "taking by sale, discount, negotiation, mortgage, pledge, lien, issue or reissue, gift or any other voluntary transaction creating an interest in property."

On the other hand, the term "consumer" is defined by the legislature in KRS 367.600 (for use in KRS 367.610), as follows:

> "Consumer" means a natural person who seeks or acquires goods or services for personal, family, or household use." (Emphasis added)

Thus, there is a subtle but critical distinction between a "consumer" and one who "purchases or leases", the difference being that "consumer" includes those who merely seek or negotiate to purchase or lease, but never consummate the transaction. As applied to this case, the distinction is the difference in whether or not Piles and Warner fall within the class protected by KRS 367.220. Since they merely negotiated for the purchase of a vehicle, but did not consummate the transaction, they were not "purchasers" and did not fall within the protected class.

It will be argued, (as it was by Judge Heyburn in Stafford v. Cross Country Bank, 262 F. Supp. 2d 776, 793 (W.D. Ky. 2003), cited by the Court of Appeals at p.10 of its Opinion), that to restrict application of the Consumer Protection Act to those who "purchase or lease" will undermine the purpose of the Act, and "...create an unintended loophole where individuals are treated like customers, yet denied the KCPA's protections." Stafford, supra at p.793. With all due respect and a full appreciation of the Court's sentiment, Appellant submits that such an interpretation of the statute is clearly at variance with its stated language.

It has been repeatedly stated by this Honorable Court that statutes "...must be given a literal interpretation unless they are ambiguous and if the words are not ambiguous, no statutory construction is required." Kentucky Farm Bureau Mut. Ins. v. Ryan, Ky., 177 S.W. 3d 797, 800 (2005); McCracken County Fiscal Court v. Graves, Ky., 885 S.W. 2d

307 (1994); Commonwealth v. Shively, Ky., 814 S.W. 2d 572 (1991). As stated in Bailey v. Reeves, Ky., 662 S.W. 2d 832 (1984):

> "We have a duty to accord words of a statute their literal meaning unless to do so would lead to an absurd or wholly unreasonable conclusion. Department of Revenue v. Greyhound Corp., Ky., 321 S.W. 2d 60 (1959)."

In Revenue Cabinet v. O'Daniel, Ky., 153 S.W. 3d 815 (2005), this Court states, at p. 819:

> "It is this Court's duty when interpreting statutes to give effect to the General Assembly's intent, but "no rule of interpretation …require[s] us to utterly ignore the plain …meaning of words in a statute." (fn 11) In fact, "[t]he plain meaning of the statutory language is presumed to be what the legislature intended, and if the meaning is plain, then the court cannot base its interpretation on any other method or source.: (fn12) We "ascertain the intention of the legislature from words used in enacting statutes rather than surmising what may have been intended but was not expressed." (fn13) In other words, we assume that the [Legislature] meant exactly what it said, and said exactly what it meant." (fn14) Only "when [it] would produce an injustice or ridiculous result" should we ignore the plain meaning of a statute. (fn 15)"

See also Stopher v. Conliffe, Ky., 170 S.W. 3d 307 (2005).

In Faust v. Commonwealth, Ky., 142 S.W. 3d 89 (2004), at p. 94, this Court notes that even though "…all statutes of this state shall be liberally construed to promote their objects and carry out the intent of the legislature', this Court must ascertain that intent from the words used, 'rather than surmising what may have been intended but was not expressed.' Flying J Travel Plaza v. Commonwealth, Ky., 928 S.W. 2d 344, 347 (1996)."

There is nothing ambiguous about the terms "purchases" or "leases", both of which require a completed contract. The term "consumer", on the other hand, is defined in KRS 367.600 as including those who merely "seek" to acquire goods or services.

As noted by this Court in City of Covington v. Kenton Cty., Ky.,149 S.W. 3d 358, 362 (2004):

> "...we apply the plain meaning rule. The words of the statute are to be given their plain meaning unless to do so would constitute an absurd result. See e.g., Executive Branch Ethics Commission v. Stephens, Ky., 92 S.W. 3d 69, 73 (2002). To qualify the word "imposed" with the word "initially" would add language to the statute, since KRS 68.197(4) makes no explicit reference to the initial imposition of a fee. "Our duty is to ascertain and give effect to the intent of the General Assembly. We are not at liberty to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language used." Beckham v. Board of Educ. of Jefferson County, Ky., 873 S.W. 2d 575, 577 (1994). Had the General Assembly intended to exempt the so-called "grandfathered" counties from not only mandatory tax credits for fees imposed prior to July 1986, but also those subsequently imposed, it surely could and would have said so in definitive words."

As for the "unintended loophole" that would supposedly "frustrate the Act's purpose", Appellant respectfully refers the Court to its decision in Autozone, Inc. v. Brewer, Ky., 127 S.W. 3d 653, 655 (2004). wherein the Court concludes in a unanimous decision:

> "We are convinced, therefore, that we should not ignore the plain meaning of the words used in KRS 342.730(4) simply because a different interpretation might further or more efficiently accomplish its ultimate purpose. Board of Education of Nelson County v. Lawrence, Ky. 375 S.W. 2d 830, 831, (1963)."

As the foregoing principals of statutory construction apply to KRS 367.220, limiting the protection of the Act to persons identified in the statute, i.e. one who "purchases or leases goods or services", does not lead to an absurd or ridiculous result. The Third Circuit Court of Appeals, when confronted with the Pennsylvania statute in Balderson v. Medtronic Sofamor Danek, Inc., 285 F. 3d 238, 241 (3rd Cir. 2002), and citing Katz v. Aetna Cas. Insur. Co., 972 F2d 53, 55 (3rd Cir. 1992), stated:

> "The statute unambiguously permits only persons who have purchased or leased goods or services to sue... Had the Pennsylvania legislature wanted to create a cause of action for those not involved in a sale or lease, it would have done so.

> The Pennsylvania Supreme Court has never addressed the issue before us. Its only reported decisions on the CPL supports the conclusion that a private plaintiff must at least have purchased or leased goods or services."

Many, if not most jurisdictions, including Texas, Indiana, Connecticut and the District of Columbia, afford protection to those who attempt to purchase, or seek to purchase, or would purchase. The Kentucky legislative body, however, chose the more restrictive terms "purchases or leases." Having defined "consumer" elsewhere in chapter 367 as a term that would include Piles and Warner, but not utilizing the term in KRS 367.220 demonstrates to Appellant a conscious determination to restrict application of the Act. This conclusion is supported by the fact that the Court of Appeals in Skillcraft Sheetmetal v. Kentucky Machinery, Ky. App., 836 S.W. 2d 907 (1992) held that the CPA requires privity of contract, yet in the ensuing 14 years the legislature has not amended the Act to extend its application to all consumers.

In contrast, when the Massachusetts Supreme Court in Dodd v. Commercial Union Ins. Co., Mass., 365 N.E. 2d 802 (1977) interpreted the precise language before this Court as requiring privity of contract, the legislature of that state promptly amended the statute to read "any person...who has been injured by another person's use or employment of any method, act or practice declared to be unlawful..."

Succinctly, KRS 367.220 only allows purchasers or leasees to sue. Since the jury has determined that there was no binding contract, i.e. that there was no purchase or lease of the vehicle, Piles and Warner are not purchasers or lessees. Accordingly, that portion of the judgment awarding damages and attorney fees for violation of the Consumer Protection Act, including the award of punitive damages, should be vacated.

II. PREDICTIONS OF FUTURE EVENTS CANNOT CONSTITUTE ACTIONABLE MISREPRESENATIONS ALLOWING RECOVERY UNDER THE CONSUMER PROTECTION ACT.

The theory that misrepresentations of "future facts" is actionable conduct under any scenario, including the Consumer Protection Act, was first advanced by the Court of Appeals beginning at p. 11 of its Opinion. Appellant preserved the issue for review in its Motion for Discretionary Review.

The Court of Appeals states, at p. 11 of its Opinion, that Kentucky courts have not written on the issue distinguishing a cause of action under the Consumer Protection Act from common law fraud. It then cited cases from Appellate Courts of Illinois and Texas, which stand for the proposition that misstatements of future events or conditions is actionable, and concluded that the salesman's statement about financing in this case was just such an actionable misstatement.

This novel concept, first advanced by the Court of Appeals, was apparently intended to have application only to the case sub judice, as the Opinion rendered was designated not to be published. Appellant would respectfully urge this Court to reject the creation of a new category of litigation, a type of hybrid between statutory and common law. The criteria utilized by the Illinois' Court of Appeals in the case cited in the Opinion of the lower Court is the same as the criteria to establish common law fraud, with two notable exceptions. First, it allows for misrepresentations of "future facts", and second, it does not require the representation to be made "knowingly or with a reckless indifference" to whether the statement is true or not. Duran v. Leslie Oldsmobile, Inc., Ill. App. 2 Dist., 594 N.E.2d 1355 (1992). It retains, however, the requirement that reliance on the misstatement must be reasonable. Duran, supra, at p. 1362.

With all due respect, Appellant submits that by definition, any statement about the future is pure speculation, subject to an infinite combination of possibilities that no person on earth can forecast with any degree of certainty. Therefore, any statement about the future cannot be a misstatement until the point in time when the event either occurs or doesn't occur. It is merely a prediction. Because of the uncertainty, Appellant submits that no one can reasonably rely upon speculation as to future events.

Of perhaps even greater concern is that the cause of action created by the Court of Appeals does not require any intent to deceive, or even the making of statements with reckless disregard for their truth. In fact, it does not even require the elements of a negligent misrepresentation that the person, in the exercise of reasonable care, should have known the representation was incorrect. Effectively, any misstatement, even if based upon a good faith belief that the statement was correct and accurate, is actionable. Appellant respectfully submits that such a radical departure from the established law should originate from the legislature.

Assuming, however, that such statements can sustain a cause of action, the limitations and parameters need to be established. For example, if Rich Brooks guarantees a winning season for the University of Kentucky football team in 2006, and someone purchases season tickets in reliance on that statement, can Coach Brooks be sued for violation for the Consumer Protection Act if UK does not have a winning season? Is justifiable reliance in the exercise of common prudence and diligence a requirement for misstatements of "future facts", as it is for misstatements of past or present facts on a

claim of fraud? See Selke v. Stewart, Ky., 86 S.W.2d 83 (1935); Wells v. Huish Detergents, Inc., 19 Fed Appx 168 (CA6, Ky., 2001).

As applied to this case, Piles, Warner and the salesman all agreed that the salesman told both Piles and Warner that he, the salesman, had no authority or control over financing, and that Piles and Warner would have to speak to the manager, Pam, about financing. They all agree that this discussion took place before any documents were signed. Piles and Warner both admitted that they never discussed interest rates, monthly payments or length of the loan with Pam, who they knew to be the only person with authority over finance. Under such circumstances, it is hard to fathom that Piles or Warner could reasonable or justifiably rely upon the salesman's predictions of financing terms.

Succinctly, erroneous predictions of future events by persons known to not have any authority, control or even input into the eventual happenings should not be allowed to provide a legally cognizable cause of action under the Consumer Protection Act.

III. THE PUNITIVE DAMAGES INSTRUCTION WAS ERRONEOUS, UNFAIR AND PREJUDICIAL SUCH THAT A NEW TRIAL ON THAT ISSUE IS NECESSARY.

The Appellant preserved this issue for review by objecting at trial to the punitive damage instruction (TAPE No. 2; 08-04-04; 18:02:30 to 18:04:00, and TAPE No. 3; 08-05-04; 10:45:10 to 10:51:45), presenting arguments to the Court of Appeals, and including it as an issue for review in the Motion for Discretionary Review.

The punitive damage instruction allowed the jury to assess punitive damages if it found for the Plaintiffs under their claims for fraud, conversion or violation of the Consumer Protection Act. The Court of Appeals properly held that the fraud claim,

based upon the salesman's prediction of financing terms, should not have been submitted to the jury. As argued hereinabove, with the jury determination that there was no contract, and therefore Plaintiffs were not "purchasers", the Consumer Protection Act claim should likewise have been excluded. Thus, Appellant submits that two of the three basis for awarding punitive damages should not have been before the jury. To allow damages to be assessed for reasons not properly before the jury, whether fraud, CPA or both, is fundamentally unfair and prejudicial. There is no rational manner to separate the jury award as being based only upon conversion, or only upon conversion and violation of the CPA. To the extent any of the award could have been based upon issues not properly before the jury, it is manifestly unjust to require a litigant to bear financial loss for mistakes by the trial court. As noted by the Court in Bayless v. Boyer, Ky., 180 S.W.3d 439 (2005):

> "an instruction must not be submitted on an issue that is entirely unsupported by evidence or reasonable inferences therefrom."

See also West Virginia Tractor & Equipment Co. v. Cain, Ky., 487 S.W.2d 910 (1972).

Here, the issue of fraud should not have been submitted to the jury, and the punitive damages instruction should not have been allowed to be predicated upon the finding of fraud. Appellant respectfully submits that the instruction was erroneous, and requires a new trial on the issue of punitive damages.

IV. THE PUNITIVE DAMAGES WERE EXCESSIVE.

The Motion for a New Trial pointed out that the punitive damages awarded of $50,000.00 was grossly excessive under the circumstances. (Record on Appeal, Vol. II,

p. 193-197). The facts reveal that other than the loss of the trade-in vehicle, neither Piles nor Warner sustained any pecuniary loss. The jury awarded $2,000.00 as the value of the vehicle, and further awarded Mr. Warner $2,100.00 for loss of use of the vehicle. It also made an award to both Piles and Warner for "inconvenience", which the Court of Appeals set aside as duplicative of the award for loss of use.

Utilizing the criteria set forth in KRS 411.186, Sand Hill Energy, Inc. v. Ford Motor Company, Ky., 83 S.W.3d 483 (2002), and BMW v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L. Ed. 2d 809 (1996), it is clear that the award of $50,000.00 bears no relationship to the actual loss of Mr. Warner. Indeed, the uncontroverted evidence was that from the time it became clear Sonny Bishop Cars could not obtain financing for the full balance due, it did everything possible to keep Piles and Warner in the vehicle, even offering to take $3,000.00 off the purchase price. To impose $50,000.00 in punitive damages against it is unconscionable, and clearly given under the influence of passion or prejudice and in disregard of the evidence and instructions.

CONCLUSION

The Kentucky Consumer Protection Act allows a person who "purchases or leases" goods or services to maintain an action against a "seller or lessor". Here, there was no purchase and no sale; therefore, neither Piles nor Warner was a purchaser or lessee, and had no right to recover under the Act. The language chosen by the legislature is clear and unambiguous, and should be enforced as it is written.

The Court of Appeals Opinion creates a new cause of action for erroneous predictions of future events even if made in good faith based upon the best information available. Weathermen be warned, for the consuming public of weather forcasts may get rain on a

day predicted to be sunny, resulting in a flood of litigation. Such an absurd result should be rejected as should the claim of anyone who relies on predictions of finance terms made by a salesman known to not have anything to do with finance.

The punitive damage instruction included matters that should never have been submitted to the jury, resulting is an award that is grossly excessive and without any rational relationship to actual damages. A new trial on the issue is the only remedy for the trial Court's erroneous instruction.

WHEREFORE, Appellant respectfully prays that his Court will vacate the verdict finding a violation of the Consumer Protection Act and all such portions of the judgment related thereto, including the award of punitive damages, and remand this action for a new trial on this issue of punitive damages for conversion of the trade-in vehicle.

Respectfully submitted,

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