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

CRAIG & BISHOP, INC., 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

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

REPLY BRIEF FOR APPELLANT and CROSS-APPELLEE 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. Sam Givens, 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; Hon. Ellen G. Friedman, 125 South Sixth Street, Louisville, Kentucky 40202; and Hon. Todd E. Leatherman, Hon. MaryEllen B. Mynear, Kentucky Attorney General, Office of Consumer Protection, 1024 Capital Center Drive, Suite 200, Frankfort, Kentucky 40601, this 16th day of February, 2007.

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STATEMENT OF POINTS AND AUTHORITIES

MAY IT PLEASE THE COURT:

STATEMENT OF PURPOSE

The purpose of this combined brief is to reply to the arguments of Appellees and the Amicus Brief of the Kentucky Attorney General as they relate to interpretation of the Kentucky Consumer Protection Act, and to respond to the arguments on cross-appeal that (1) statements concerning future events can sustain a common-law action for fraud and (2) "inconvenience" damages are recoverable. Throughout this Brief, Appellant Craig & Bishop, Inc. will be referred to as "Sonny Bishop Cars", and Appellees Christy Piles and Charles Warner will be referred to as Piles and Warner.

ARGUMENTS

I. NEITHER PILES NOR WARNER WERE "PURCHASERS", AND THEREFORE THEY DO NOT FALL WITHIN THE CLASS OF PERSONS ALLOWED TO BRING AN ACTION UNDER KRS 367.220.

KRS 367.220 allows "any person who purchases or leases goods or services..." to bring an action for violation of the Consumer Protection Act. And even though Sonny Bishop Cars believed that Christy Piles purchased the vehicle when she signed the numerous documents and drove the Camaro off the lot, the jury concluded that there was no purchase or sale of the vehicle. This portion of the jury verdict has not been appealed.

As a result, Sonny Bishop Cars had no right to dispose of the trade-in vehicle, and the jury awarded Mr. Warner $2,000.00 (twice the agreed upon trade-in value) for conversion of the trade-in vehicle. Also as a result, Sonny Bishop Cars did not receive the sales price of the vehicle, Christy Piles did not keep possession of the Camaro, and she did not have to pay more than $250.00 per month or more than 8% interest for any loan. In fact, she never paid one penny to Sonny Bishop Cars toward any purchase. And,

by virtue of the jury award to Mr. Warner for the conversion of his vehicle, it cannot be argued that Sonny Bishop Cars received the trade-in as "payment" towards any "purchase".

It is argued by Appellees and the Kentucky Attorney General[1] that because Piles and Warner negotiated with Sonny Bishop Cars, and because Sonny Bishop Cars mistakenly believed Piles had purchased the vehicle, Piles should be treated as a "purchaser" for purposes of the Act. Their argument relies heavily upon the legislative intent and public policy, ostensibly to the effect that it would be absurd or wholly unreasonable to deny Piles and Warner the ability to pursue a claim for violation of the Act.

In truth, however, they are asking the Court to rewrite the statute to read, "any consumer of goods or services... may bring an action..." for the legislatures chosen language of "any person who purchases or leases goods or services... may bring an action." With all due respect to Judge Heyburn writing for the United States District Court for the Western District of Kentucky in Stafford v. Cross Country Bank, 262 F2d 776 (W.D.Ky 2003), Appellant submits that to interpret the statute as it is written does not "create an unintended loophole", but rather shows deference and respect for the legislative branch of government in deciding who is entitled to bring an action. If the General Assembly had wanted "consumers", "customers", "people who negotiate", "people who sample or test", or any other class of persons other than those "who purchase or lease", it surely would have chosen more expansive language than it did. As

[1] The Attorney General seems to be under the impression that Appellant is asking this Court to hold that a "formal written contract" is required to qualify a person as a "purchaser". Appellant's only argument is that one must "purchase or lease" to bring an action for violation of the Consumer Protection Act. Whether the "purchase or lease" is in writing is immaterial, unless the statute of frauds is applicable.

noted by this Court in Revenue Cabinet v. O'Daniel, 153 SW3d 815 (Ky., 2005), citing to well established precedent (citation omitted) at p. 819:

> "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. (fn15)"

Appellees also argue that the events leading to this litigation should be viewed as a condition precedent contract, which they characterize as a conditional purchase. However, as the term itself implies, if the condition is not met, there is no purchase. Here, since the alleged condition of financing at no more than 8% for no more than 5 years with payments of not more than $250.00 could not be met, there was no purchase.

Finally, Appellee and the Attorney General attempt to refute the authorities cited by Sonny Bishop Cars in support of its position on this issue by distinguishing the facts of each case and/or the arguments presented. Appellant will concede that the facts of the cited cases are not exactly like this case, and that none of the cases cited were interpretations of the term "purchaser". However, Balderson v. Medtronic Sofamor Danek, Inc., 285 F3d 238 (3rd Cir. 2002), Katz v. Aetna Cas. Insur. Co., 972 F2d 53 (3rd Cir. 1992), and Skillcraft Sheetmetal v. Kentucky Machinery, 836 SW2d 907 (Ky. App., 1992) all recognize that a **claimant must have at least purchased or leased** goods or services. While the above cited cases dealt with subsequent purchasers or ultimate users of the product, (none of whom were within the protected class, having not dealt directly with the seller) they all recognize that a sale/purchase is required by the Act. The Third

Circuit recognized that if 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 Skillcraft Court recognized the choice of language used by other states (Massachusetts and Texas) which allow causes of action for any person "... who has been injured", or who "seeks or acquires", and concluded that the statute adopted by Kentucky's legislature "... plainly contemplates an action **by a purchaser** against his immediate seller." Id., p. 909.

Appellant respectfully asks this Court to interpret the statute as it is written and according to its plain meaning. If the legislature desires to create a cause of action for all "consumers", or to create a definition for KRS 367.220 of "purchaser" that includes those who negotiate but do not consummate the purchase, then it will surely do so. Until then, however, only those who actually purchase or lease goods or services should be allowed to bring an action.

II. COMMON LAW FRAUD REQUIRES A MISREPRESENTATION OF A PAST OR PRESENT MATERIAL FACT WHICH IS LIKELY TO AFFECT THE CONDUCT OF A REASONABLE MAN AND BE THE INDUCEMENT OF A CONTRACT.

The law of the Commonwealth is well settled that in order to prevail on a claim of common law fraud, a plaintiff must prove by clear and convincing evidence (a) a material misrepresentation (b) which is false (c) known to be false or made recklessly (d) made with inducement to be acted upon (e) acted in reliance thereon and (f) causing injury. United Parcel Service Co. v. Rickert, 996 SW2d 464, 468 (Ky. 1999). It is equally well settled that the misrepresentation must relate to an existing or past material fact. As stated McHargue v. Fayette Coal & Feed Company, 283 SW2d 170 (Ky. 1955) at p. 172:

> "Actionable misrepresentation must relate to a past or present material fact which is likely to affect the conduct of a reasonable man and be an

> inducement of the contract. A mere statement of opinion or prediction may not be the basis of an action. The representation must be short of a warranty but sufficient to deceive and to create in the mind a distinct representation of a fact."

Here, the alleged misrepresentation was that the salesman "guaranteed he could get" Piles and Warner financing at no higher than 8% with payments of no more than $250.00. Such a statement is clearly a prediction of a future event, which causes Cross-Appellants to argue that it is nevertheless actionable because "a representation of the makers own intention to do or not to do a particular thing is fraudulent if he does not have that intention." (Appellees Brief p. 42).

Here the statement was allegedly made by a person known by Piles and Warner to have no authority over finance, made prior to any discussions with the person who did have authority, predicting what a third party finance company would do in the future. The salesman did not say that Sonny Bishop Cars would provide financing at no more than 8% with payments of no more than $250.00. Instead, Ms. Piles testified she told him that she didn't want to pay more than $250.00 per month and an interest rate of no more than 8%, and "he said that that definitely shouldn't be a problem". (VR2; 8-4-04; 13:29:43-13:29:50). His statement certainly was not a representation of a promise that Sonny Bishop Cars would itself provide any financing on any terms, or even a "guarantee" that a finance company would provide such terms, but merely a prediction that based upon Piles credit "it shouldn't be a problem." Thus, there was no representation of Sonny Bishop Car's intention to do or not do any particular thing.

This situation is clearly distinguishable from the facts of Hanson v. Am. Nat. Bank & Trust Co., 865 SW2d 302 (Ky. 1993), where the Defendant bank made specific representations of what it, the bank, intended to do in the future, **all with full knowledge**

(as reflected in an internal memorandum) that once the loan restructuring occurred, the bank intended to cut off the line of credit so as to force Hanson to sell his personal belongings. Thus, at the time the bank made its representations to Hanson, it already knew it had no intention of making good on its promises, which would make its statements a misrepresentation of existing fact.

In contrast, here the salesman said "it shouldn't be a problem" for Piles and/or Warner to get financing from another entity on the terms desired by Piles. This prediction of what a third party may or may not do in the future is a far cry from a statement of Sonny Bishop Cars' intention to do anything, much less evidence of an existing intention to not do that which Appellees contend was "guaranteed".

Without conceding that an action for fraud can be predicated on a statement concerning future events, the Restatement (Second) of Torts Section 530(1) requires an actual intent to not perform in the future. While it is unclear from the text of the Opinion in Hanson, supra, whether the claim of fraud was defended on the basis of the representations being of future events, it is clear that prior to making the representations the bank had in place a game plan to cut off access to credit once it secured the refinancing of existing debt. Here, at worst, the salesman's statements were made recklessly, since at the time the statements were allegedly made he had not even spoken to the person in charge of finance.

Furthermore, it is well settled that to recover for fraudulent inducement, the complaining parties mush show that they were justified in relying upon the representation in the exercise of common prudence and diligence. Selke v. Stewart, Ky., 86 S.W.2d 83 (1935); Wells v. Huish Detergents, Inc., 19 Fed Appx 168 (CA6, Ky., 2001). Here, both

Plaintiffs knew prior to signing any documents that the salesman was not authorized by Sonny Bishop Cars to deal in the financing of the vehicles. Yet they never discussed any specific terms with the person they knew to be in charge of finance (Pam), nor did they insist that the allegedly guaranteed terms be placed in writing on any documents they signed. (VR 2; 8-4-04; 14:29: 50 to 14:30: 25). Appellant respectfully submits that under these uncontroverted facts, Piles and Warner could not, as a matter of law, be deemed to have reasonably or justifiably relied upon statements of someone they knew lacked authority to make such representations.

Likewise, any such alleged oral statements as to financing terms cannot, as a matter of law, be relied upon when they contradict expressed terms of a written and signed document, such as here, where the vehicle purchase agreement states in bold type just above Ms. Piles signature:

> "BUYER ACKNOWLEDGES THAT NO ORAL PROMISES OR REPRESENTATIONS HAVE BEEN MADE PRIOR TO THE EXECUTION OF THIS AGREEMENT WHICH HAVE NOT BEEN INCORPORATED HEREIN BY REFERENCE."

The facts of this case fall squarely within the parameters of Rivermont Inn v. Bass Hotels & Resorts, 113 SW 3d 636 (Ky. App. 2003), in which the vice-president of franchise administration for Holiday Inn "...told him that licensing would be forthcoming and to close on the property." Id. p. 639. The Court of Appeals properly concluded that the statement of the vice-president "is a prediction, and not a statement of present or past material fact." Id. p. 640. Of particular significance to this case, in Rivermont, supra, the Plaintiff knew that the vice-president lacked authority to make any oral promises regarding franchising, just as Piles and Warner here knew the salesman had no authority

or control over finace. In Rivermont, as here, such oral statements were in conflict with written disclaimers to the contrary.

Finally, Ms. Piles did not suffer any harm in reliance upon the alleged statements, as she has never paid one dime to Sonny Bishop Cars. (VR. 2; 8-4-04; 10:53:35). And while Mr. Warner did lose his Nissan, the jury verdict on conversion compensated him for the loss. Indeed, in order for him to prevail on the conversion claim, the jury had to conclude that no sale had taken place; otherwise, Sonny Bishop Cars would have been the owner of the trade-in vehicle when it was sold to the wholesaler.

Because the proof in this case completely fails on several required elements to sustain an action for fraud, much less reaching the required level of "clear and convincing proof" of each element, the jury should have never been given an instruction on the issue. The Court of Appeals recognized the error of allowing the issue of fraud to be submitted to the jury, and reversed that part of the judgment. Appellant submits that this portion of the Court of Appeals decision should be affirmed.

III. THE DAMAGES AWARDED UNDER VERDICT FORM F SHOULD BE SET ASIDE AND HELD FOR NAUGHT

The verdict form submitted to the jury, specifically verdict form F, provided that upon a finding for Plaintiff under Instruction No. 6 (violation of the Consumer Protection Act) or Instruction No. 7 (fraud), the jury could award damages for both loss of use of the vehicle and "inconvenience" to Piles or Warner. Because Piles and Warner did not "purchase or lease" anything form Sonny Bishop Cars, and the jury should not have even been given any instruction on fraud, the award of damages under verdict form F should be vacated and held for naught. However, if this Court should determine otherwise, Appellant submits that the award of "inconvenience" damages to Piles and Warner is

duplicative of the award for "loss of use" of the intended trade-in vehicle, and should be vacated.

CONCLUSION

Neither Piles nor Warner purchased or leased anything from Sonny Bishop Cars. KRS 367.220 only allows those who purchase or lease goods or services to maintain an action for violation of the Consumer Protection Act. Since Piles and Warner do not fall within the class designated by the legislature, their claim under the Act must fail. Likewise, the salesman's statement that it "definitely shouldn't be a problem" to get Piles financing on her desired terms is a prediction of what a separate financing entity might offer in the future, not a statement of Sonny Bishop Cars present intention to offer financing on those desired terms. As such, the elements essential to submit a claim of common law fraud are not present.

WHEREFORE, Appellant respectfully prays that this Honorable Court will reverse the Court of Appeals Opinion finding violation of the Consumer Protection Act and all portions of the judgment relating thereto; will affirm the Court of Appeals Opinion vacating the jury verdict as to fraud; and remand this action for a new trial on the sole issue of punitive damages for Appellant's conversion of the Nissan.

Respectfully submitted,

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