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

CRAIG AND BISHOP, INC.,
D/B/A SONNY BISHOP CARS — APPELLANT

V.

APPEAL FROM
JEFFERSON CIRCUIT COURT
ACTION NO. 03-CI-07221

CHRISTY PILES and
CHARLES WARNER
ELLEN G. FRIEDMAN

COURT OF APPEALS
N0. 2004-CA-001883-MR

APPELLEES

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

BRIEF FOR APPELLEES

Submitted by

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was on the 6th day of April 2005, mailed first class postage paid to Hon. FRED E. FISCHER and Hon. MIKE KELLY, Counsel for Appellant, 718 West Main Street, Two South, Louisville, KY 40202; Hon. Sam Givens, III, Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, Kentucky 40601-9229; and Hon. Steve K. Mershon, Jefferson Circuit Judge, The Judicial Center, 700 W. Jefferson St., Louisville, KY 40202.

ELLEN G. FRIEDMAN

INTRODUCTION

This is fraud, consumer protection and conversion case against a used car dealer. The Appellant objects to that part of the Court of Appeals Opinion upholding the punitive damages award. Appellees have cross-appealed, objecting to the Court of Appeals' reversal on the fraud claim and inconvenience damages.

STATEMENT CONCERNING ORAL ARGUMENT

Appellees agree that oral argument would assist the Court in deciding the issues presented, particularly in applying the facts of this case to the law.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Appellees do not accept, in its entirety, Appellant's Statement of the Case as it contains mischaracterizations and significant omissions, particularly as to the intention, willful and malicious acts that support the jury's determination of punitive damages. Appellees therefore submit this counterstatement in its stead.

I. SUMMARY

Appellant Sonny Bishop Cars[1] ("Sonny Bishop") lured Appellees (Piles and Warner) to its car lot on false pretenses; engaged in bait and switch; entered into a condition precedent contract for the sale of a Camaro – the condition being financing on terms it knew or should have known it could not deliver; and disposed of Warner's trade-in vehicle (Nissan) before the deal was final. Next, Appellant attempted to squeeze more money from the Appellees when the promised financing did not materialize, and when the Appellees refused and instead demanded the Nissan be returned, Appellant engaged in a series of outrageous cover-up activities to conceal that the Nissan was already gone. These actions included lying, name-calling, threatening to call the police, placing phony dates on legal documents, falsely notarizing Warner's signature on the Nissan title at a later date, and threatening Appellees with a lawsuit and repossession if they did not immediately pay the entire amount in cash.

[1] The Appellant is actually Craig and Bishop, Inc., doing business as Sonny Bishop Cars.

A jury, after listening to all the evidence and judging the credibility of the witnesses, found for Appellees on all counts – conversion, fraud/misrepresentation and violation of the Kentucky Consumer Protection Act ("KCPA"). It awarded Appellees $8,600 in actual damages - $2,000 – the value of the Nissan; $2,100 for loss of use of the Nissan; $3,000 inconvenience damages for Warner and $1,500 inconvenience damages for Piles; and $50,000 in punitive damages. The Court awarded attorney's fees of $22,662.50 pursuant to the KCPA.

The Kentucky Court of Appeals rendered an Opinion Affirming In Part and Vacating In Part. That Court determined that the promises that the salesman made to the Appellees in order to induce them to hand over their Nissan and agree to purchase the Camaro constituted the mere prediction of a future event and therefore could not support a claim of fraud. That Court also found the inconvenience damages duplicative of the loss of use damages and eliminated those. The Court of Appeals upheld the remainder of the jury's verdict and judgment of the trial judge.

II. SPECIFIC FACTS

Nineteen-year-old Warner had been looking for a car to replace the 1997 Nissan he was currently driving for something "a little nicer." (Transcript of Record ("TR") Tape 1-10:30) On June 30, 2003, he saw an advertisement placed by Sonny Bishop in the Thrifty Nickel (PX 1) for a 1997 Ford Mustang, selling price $4950 with payments of $109 per month. He immediately called to see if the Mustang was still available. (TR Tape 1-

10:01-42-10:02:50) He was kept waiting on the telephone five to ten minutes while someone from Sonny Bishop supposedly checked. When the salesman came back on the line, he told Warner the Mustang was there, he needed to come on in before they closed. (TR Tape 3-11:15:30-11:16:30)

Twenty-year-old Piles, Warner's girlfriend at the time, received a call at work from Warner, who was excited about the Mustang. She went to his home and they drove out together to Sonny Bishop. (TR Tape 2-13:20:35-13:22:30)

They told Glenn Summitt ("Summitt") the salesman who greeted them that they were there to see the Mustang in the ad. He introduced them to Lawrence, another salesman, who drove them to a second lot to see the car. Before leaving, Summitt took Appellees' drivers licenses; he told them it was so he could run their credit to get an idea what he could do for them as far as financing. (TR Tape 2-1:20:25) The Mustang was not at the other lot, and following a telephone call to check, Lawrence told them that the Mustang had been sold earlier. When nothing on that lot interested them, Lawrence drove them back to the original lot. (TR Tape 2-13:23:30-13:26)

Summitt greeted them again. While they were gone he had, as promised, checked their credit worthiness, and he steered them to a Camaro that cost over $14,000. Warner liked it, but both he and Piles were concerned about its expense. They made it very clear to the salesmen that they had no cash - only Warner's Nissan to put down and they would need financing. Piles told Summitt that they were looking for something less expensive and that

they could not afford to pay more than $250 per month and did not want an interest rate above 8%. (TR Tape 1:23:35) Summitt told them not to worry. "I guarantee you I can get you in that car if you like it." (TR Tape 2-12:26:50-23:29, TR Tape 2-13:29:28, TR Tape1-10:08-10:10)

Summitt, who was neither authorized nor qualified to do the financing, (TR Tape 1-13:43-44), called General Manager Pam Bishop Ferguson ("Ferguson") at home who was so authorized. Ferguson determined that Warner had insufficient credit and that the loan had to be in Piles' name only. Piles agreed. Ferguson authorized Summitt to allow the Appellees to take the vehicle home. (TR Tape 1-13:43-13:48)

Piles signed a number of documents that night in connection with the purchase: of most significance were a Vehicle Purchase Agreement, PX 7, and Affidavit of Spot Delivery, PX 8. Summitt asked Piles to sign a blank Retail Installment Contract (RIC), also known as a credit sales agreement, similar to the one introduced into evidence as PX 15, but she refused. (TR Tape 2-13:37:15-13:38:40) Summitt told her that it was part of the paperwork that was required, but that because no one from the finance department was at the lot, they would have to fill it in later. (TR Tape 2-13:38:04) He told her that Ferguson would have it ready in the next day or two. (TR Tape 2-13:39:45) Warner also signed the title to his Nissan in blank. (PX 22) They were told they could take the Camaro home. Appellees left the Nissan with Sonny Bishop and drove off in the Camaro. They were never given any written credit terms. (TR Tape 1-14:17)

This type of transaction is known in the car industry as a spot delivery or yo-yo sale. [2] It is typically used to allow a customer to take immediate delivery of a vehicle (on the spot) while waiting for the financing to be completed. It takes the customer out of the market and protects the dealer should it not be able to sell or assign the RIC to a finance company. If that happens, the Affidavit of Spot Delivery requires the customer to return the vehicle to the dealer. (Tape 1-16:22-16:35, 16:54-16:56)

As part of a spot delivery, a RIC is supposed to be completed – indicating the terms of the credit sale – the finance charge, APR, monthly payments, etc. (Tape 1-16:35, 1-16:46:35)) The RIC is actually an agreement between the dealer and the customer. (Tape 1-16:46-48) The dealer agrees to provide the customer financing and then attempts to sell or assign that RIC to a finance company so that the dealer can get paid. (Tape: 1-16:46:35-48:00) (Also see PX 5, Agreement between Sonny Bishop and Onyx Financing regarding general terms of finance contract sales. TR Tape 1-13:51)

The deal is not final until the RIC is sold or assigned to a finance company and the dealer is paid. Until that time, any trade-in that is used as part of a down payment must be held by the dealer; it may not dispose of the trade-in until the transaction is complete. If the financing on terms provided in the RIC is not obtained, the trade-in must be returned to the customer

[2] See National Consumer Law Center, Unfair and Deceptive Acts and Practices, § 4.4.5.1, provided in the appendix, herein.

unless the dealer and customer agree to enter a revised RIC. (TR Tape 1-16:34-35, 16:41-16:45)

Appellant could not find a finance company to pay Sonny Bishop the amount it wanted. Onyx offered to pay $11,000 at 11% or 12% interest, at the option of the dealer, leaving approximately a $3000 difference. (TR Tape 1-13:54-13:57 and PX 6) Summitt notified Piles on July 2, 2003 that full financing was not available as promised and that they would need an additional $3,000. (TR Tape 1-3:40:10) She told him that they did not have and did not wish to borrow the $3,000 and that they would bring back the Camaro and pick up Warner's Nissan. (TR Tape 2-13:40:10-13:42)

Appellees attempted to return the Camaro and retrieve the Nissan on several occasions over the next ten days or so. The first attempt was on July 2 or July 3, and they were told that Ferguson was the only one authorized to return the Nissan and she was out of town. (TR Tape 2-13:42:39) Appellees did not see the Nissan on the lot at that time. (TR Tape 213:43)

On July 6, 2003, Piles called and was told not to come in because Ferguson was not in. Piles and Warner drove in anyway and found Ferguson there. Appellees demanded the return of the Nissan, but Ferguson told them that the keys to the Nissan were locked up in the safe and that she was not officially working that day and did not have the keys with her. Appellees refused to accept this answer and refused to leave without Warner's Nissan. There was a heated argument between Piles and Ferguson, and Ferguson threatened to call the police on them if they did not leave. (TR Tape 2-13:43-

13:48) Ferguson called Piles a bitch. (TR Tape 2-13:47:50) Summitt told Warner that he "wanted to lay one across Christy." (TR Tape 1-10:24)

One of the other salesmen (Roger) tried to make peace – promising Piles and Warner that he would drive the Nissan to Piles' office the next day if they would leave. They agreed. (TR Tape 2-13:48:50-50:30) But the following day – July 7, 2003 – Roger called Piles and told her he was not permitted to bring her the Nissan and she would have to come back in herself. (TR Tape 2-13:51:20)

Because she had been missing so much work, Appellees arranged for Warner to drive the Camaro back to the lot on July 10. (TR Tape 2-13:52) Sales Manager Don Raley told Warner that the Nissan had been sold and that Warner must bring him $14,000 by 5 p.m. or it would be treated as a repossession. (TR Tape 1-10:28-29, 2-13:57-14:00)

This was the first time that Sonny Bishop revealed to the Appellees that it had disposed of the Nissan. (TR Tape 1-10:29:30) Warner had given Sonny Bishop the title to his Nissan signed in blank on June 30, 2003 (PX 22); but the date that his signature was later notarized was July 10, 2003 and it shows a transfer of title to Dan Cook on July 11, 2003. (PX 14)

Ferguson testified that she was sure that the Nissan had not been physically given to Cook prior to the 11th; however, a note contained in the dealer file written by Sonny Bishop office manager stated: "Ferguson-hold up on transfer, trying to get car back." (PX 14) Dan Cook testified that he might have had the vehicle in his possession as early as July 1. He explained that

this was routine practice for a wholesaler to be given the vehicle and the paperwork prepared later. (TR Tape 2-3:26:45)

Finally, on July 14, 2003, Appellees returned the Camaro to the lot with the keys and left it there with a letter from their attorney. (TR Tape 1-10:48) PX 19 Raley, on behalf of Appellant, sent a letter to Appellees notifying them that the Camaro was considered repossessed and would be sold at auction. This suit followed.

ARGUMENTS

I. APPELLEES WERE PURCHASERS WITHIN THE MEANING OF THE KENTUCKY CONSUMER PROTECTION ACT.

A. STATUTORY CONSTRUCTION

The language of the Kentucky Consumer Protection Act ("KCPA" or the "Act.") is expansive enough to include Appellees within its definition of "purchasers." The KCPA declares unlawful, "unfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce." KRS 367.170. The legislature has defined "trade" and "commerce" as

> the advertising, **offering for sale**, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value, and shall include any trade or commerce directly or indirectly affecting the people of this Commonwealth

KRS 367.110 (2). (Emphasis added.)

The statute then provides that an action to enforce the KCPA may be brought by "any person who purchase or leases goods or services primarily for personal, family or household purposes . . . ." KRS 367.220 (1). "Person" is

defined broadly as "natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity." KRS 367.110 (1).

The KCPA contains no definition of purchase or purchaser, and Appellant urges this Court to limit the definition, and therefore limit who may utilize the KCPA, to one who has entered a valid and binding contract for the sale of goods. This interpretation is without any foundation or authority. In fact, the application of this narrow meaning of purchaser would render meaningless that part of the statute that defines "trade" and "commerce" as including "offering for sale." By including such broad coverage, it is clear that the legislature intended to include more than just consummated sales.

> (A) statute must be read as a whole and in context with other parts of the law. All parts of the statute must be given equal effect so that no part of the statute will become meaningless or ineffectual.

Lewis v. Jackson Energy Co-Op. Corp., 189 S.W.3d 87, 92 (Ky. 2005)

Appellant urges this Court to apply the definition of "purchase" and "purchaser" from the Uniform Commercial Code; however, that definition, even if applicable provides no additional clarity and is itself broad enough to encompass the transaction herein.

> "Purchase" means taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift, or **any other voluntary transaction creating an interest in property.**

KRS 355.1-201 (ac)

Piles and Warner are clearly purchasers according to Appellant's proposed definition, having taken the Camaro by "sale" or by "any other voluntary transaction creating an interest in property." Piles and Warner made a partial payment for the purchase of the Camaro, having turned over Warner's trade-in as a down payment. (PX 22) Piles and Warner had, at the very least, an equitable interest in the Camaro so that by Appellant's own proposed definition they were "purchasers" for KCPA purposes.

And even the cases cited by Appellant calling for a literal reading of the statute caution against doing so where the result would be "absurd or wholly unreasonable." *Baily v. Reeves,* 662 S.W. 2d 832, 834 (Ky. 1984)

B. LEGISLATIVE INTENT

The KCPA is a remedial act intended to protect vulnerable consumers like the Appellees here. The legislature declared its intent in enacting the KCPA:

> ***367.120.*** **Legislative intent — Title.**
> (1) The General Assembly finds that the public health, welfare and interest require a strong and effective consumer protection program to protect the public interest and the well-being of both the consumer public and the ethical sellers of goods and services; . . . .

In *Stevens v. Motorists Mut. Ins.* Co., Ky., 759 S.W.2d 819 (1988), the Supreme Court of Kentucky held that KCPA was expansive enough to encompass claims by home owners against their own insurance companies. In arriving at this decision, the Court reasoned:

> the Kentucky legislature created a statute which has the broadest application in order **to give Kentucky consumers the broadest possible protection for allegedly illegal acts.** In addition, KRS 446.080 requires that the statutes of this Commonwealth are to be **liberally construed.**

Id at 821.

In *Kentucky Insurance Guaranty v. Jeffers,* 13 S.W.3d 606 (*Ky.* 2000), the Kentucky Supreme Court applied retroactively a statute amending the Kentucky Insurance Guaranty Association Act, primarily because, as here, it was determined to be a statute of remediation. The Court also referenced KRS 446.080, which requires a liberal interpretation of statutes "with a view to promote their objects and carry out the intent of the legislature. . . ." KRS 446.080 (1)

The *Jeffers* Court cited Learned Hand:

> The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. In Cabell v. Markham, 148 F.2d 737, 739 (2nd Cir. 1945), Judge Learned Hand commented:
>
> "Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to **remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."**

Jeffers, supra at 610-611.

Moreover, Appellant here treated the Appellees as purchasers. It had them sign a purchase agreement, sold their trade-in, demanded payment, and ultimately sued them for the purchase price. Finding that these Appellees are excluded from the protection of the KCPA would indeed lead to an absurd result.

That was the opinion of a federal district court interpreting Kentucky law. In *Stafford v. Cross Country Bank,* 262 F. Supp.2d 776 (W.D. Ky. 2003), a bank was accused of reporting inaccurate credit information because its records erroneously indicated that Stafford was a credit card customer who owed money on his account. The bank made the same argument, as does the Appellant here - that KCPA did not apply because there was no contractual relationship between the parties. After careful review of Kentucky law, the Federal District Court rebuffed that argument.

> To deny a potential remedy simply because the consumer says he never intended to become a purchaser when, for all practical purposes he was treated as one, would belittle the KCPA's purpose, **it would create an unintended loophole where individuals are treated like customers, yet denied KCPA's protections**. The Court declines to adopt such an approach

Id at 793.

The Missouri Court of Appeals was faced with a similar argument in *Antle v. Reynolds*, 15 S.W.3d 762 (Mo. App. 2000). In Missouri, if there is no transfer of title, a statute governing the transfer of motor vehicles voids the sale entirely. A car dealer argued that because the sale was deemed void, the

provisions of Missouri's equivalent of the KCPA (Merchandising Practice Act, §§ 407.020--. 300) were inapplicable because there was technically no purchase. The Missouri Act like the KCPA restricts its application to "(a)ny person who purchases or leases merchandise primarily for personal, family or household purposes." RSMo 407.025

The Missouri Court rejected that argument. It determined through statutory construction and application of public policy that it is "the substance of the transaction" that is critical, not whether the transaction is ultimately found void and unenforceable. *Antle* at 766.

C. APPELLEES WERE PURCHASERS IN FACT

There is no requirement, as proposed by Appellant, that a purchase must be legally consummated by binding contract to be regulated by the Act. This issue arose only because Appellant (explicitly conceding that it considered the transaction a sale) counterclaimed for payment on the purchase agreement.

The instructions to the jury under Instruction 2 (Verdict Form provided in the appendix, hereto) were to determine if, as Appellant had claimed, Appellees were in breach of a contract with Appellant and therefore owed them money. The jury was asked to "determine from the evidence whether or not the parties reached an agreement, that is, entered into a binding contract." The jury found that "no", the parties did not enter a binding contract" that would make Appellees liable for damages. It does not logically follow that there was therefore no purchase.

Although the Appellant has insisted that the Vehicle Purchase Agreement created a final and binding contract for Piles to pay cash for the Camaro, even suing for the purchase price, the jury listened to the evidence and disagreed. The jury instead found that Sonny Bishop had engaged in fraudulent, deceptive, misleading and/or unfair practices and that Appellant was not entitled to enforce the alleged cash sale agreement. Appellant now tries to turn that finding on its head by claiming that a purchase contract cannot support a claim for deceptive practices when it is Appellant's own illegal actions that caused the contract to be unenforceable.

Although the KCPA definition of purchaser is broad enough to encompass the Appellees, another way to reconcile the purchase with the finding of no valid contract is that the purchase was based upon a condition precedent contract – the condition being that Sonny Bishop would provide financing at the promised terms.

> A condition may be precedent to the existence of a contract or precedent to an obligation immediately to perform the contract. A condition precedent to an obligation to perform immediately calls for the **performance of some act or the happening of some event after a contract is entered into and upon the performance or happening of which its obligation to perform immediately is made to depend**. The parties are at liberty to agree upon a condition precedent upon which their liability shall depend.

Liebowitz v. Allied Brewing & Distilling Co., Inc., 281 Ky. 21 134 S.W.2d 994 (1939) citing Am. Jur. (Emphasis added.) (Internal citations omitted.) It is

possible to make purchase that is later returned; that does not undo the fact of the purchase in the first place.

D. APPELLANT'S AUTHORITIES REFUTED

Appellant's reliance on *Skilcraft Sheetmetal v. Kentucky Machinery*, 836 SW 2d 907 (Ky. App 1992) is misplaced. That case merely holds that a seller cannot be liable to a third party who purchases consumer goods from the original purchaser.

> a subsequent purchaser may not maintain an action against a **seller with whom he did not deal** or who made no warranty for the benefit of the subsequent purchaser. **The language of the statute plainly contemplates an action by a purchaser against his immediate seller.**

Skilcraft at 909. (Emphasis added.)

Skilcraft Sheetmetal is a privity case, not a case interpreting the meaning of the word "purchaser." In the present case there was no middle person to the transaction. Piles and Warner dealt directly with Appellant.

Balderston v. Medtronic Sofamor Danek, Inc., 285 F.3d 238 (3rd Cir. 2002) and *Katz v. Aetna Cas. Insur. Co.*, 972 F.2d 53 (3rd Cir. 1992), the federal cases cited by Appellant interpreting Pennsylvania law are inapposite. In the first, Dr. Baldertson brought suit under the state consumer protection act claiming that Defendant medical manufacturers intentionally concealed and misrepresented the Food and Drug Administration approval status of their pedicle screws, which he surgically implanted and that in turn caused injury to his patients. The Court found that it was the patients who

were the purchasers and who suffered the direct injury, and that because Dr. Balderston was not bringing the claim on their behalf, he was not a purchaser covered by the act.

The Court further reasoned that Dr. Baldertson was not the kind of person that Pennsylvania public policy meant to protect in these circumstances, *Id* at 242, and in addition, the Court found that as a second reason that the consumer protection act did not apply, the purchase was not for "personal, family or household use." *Id.*

The holding of the *Katz* case, from which the *Balderston* Court and Appellant herein quote, likewise does not support Appellant's supposition that Piles and Warner were not purchasers. *Katz* merely held that the Pennsylvania consumer protection laws that cover purchasers could not be used to sue someone else's insurance company. Even the quotation selected by Appellant has no relevance as it seeks to exclude from the definition of purchaser, "those **not involved** in a sale or lease." *Katz* at 55. (Emphasis added.) That is hardly the case in the transaction between the parties herein.

Nor does the Massachusetts case, *Dodd v. Commercial Union Ins. Co., Mass*, 365 N.E. 2d 802 (1977) support Appellant's argument. That Court merely held that the sale of auto insurance was covered by the consumer protection act. In *dicta*, the Court noted that only a person who actually purchased a policy could bring suit under the act, as opposed to an individual merely covered by the policy.

Appellant is further mistaken in arguing that *Dodd* stands for the proposition that it is up to the legislature to broaden the definition of purchaser. The Dodd Court mentions that the statute was amended previously, but the amendment was to create a private right of action for individual purchasers where previously only the attorney-general had standing to utilize the act. In any case, *Dodd* does not support Appellant's argument that Warner and Piles should not be treated as purchasers for purposes of the KCPA.

E. SUMMARY

Piles and Warner were directly involved in the transaction. They purchased a vehicle from Sonny Bishop and drove it home expecting that Appellant would deliver on its promised financing. They are exactly within the class of individuals designated for protection by the legislature. In light of the expansive definition of "trade" and "commerce," the policy behind the KCPA and the specific facts of this case, "purchase" must be given a sufficiently broad reading to encompass Piles and Warner.

II. THE COURT OF APPEALS CORRECTLY UPHELD THE JURY'S DETERMINATION THAT THE KCPA WAS VIOLATED

Appellant argues that because it made promises as to future events it cannot have violated the KCPA – in other words, that the elements of a KCPA violation are coterminous with those of the common law tort it resembles. Appellees' response to this argument is two-fold: first, the Court of Appeals was correct in holding that a consumer protection action (as opposed

to common law fraud) is allowable as an unfair, deceptive or misleading act, even where the misrepresentation was concerning a future event, and second, that there were a multitude of unfair, deceptive and misleading acts and practices in its dealings with Appellees in this case to support the jury's finding that the Appellant violated the KCPA without reference to the misrepresentations concerning financing.

A. A KCPA VIOLATION CAN BE PREDICATED ON A PROMISE TO PERFORM IN THE FUTURE

As discussed in more detail in the brief on cross-appeal, below, even common law fraud can be predicated upon the promise of future performance where there is no present intent to perform, *Hanson v. Am. Nat. Bank & Trust Co.*, 865 S.W.2d 302 (Ky. 1993) and Restatement (Second) of Torts § 530 (1) (1977); and it is well-accepted that consumer protection legislation provides broader coverage than the strict tenets of the common law.

The Court of Appeals, in its Opinion, holding that a misrepresentation based upon future performance is cognizable by the KCPA relied in part on the Illinois Court of Appeals, which discussed the differences between strict common law and the legislative intent to expand coverage with enactment of a consumer protection statute similar to Kentucky's.

> The majority of the elements of common-law fraud have been eliminated by the Consumer Fraud Act, and it affords broader consumer protection than the common-law action of fraud by prohibiting ***any*** deception or false promise.

Duran v. Leslie Oldsmobile, 229 Ill.App.3d 1032, 1039, 594 N.E. 2d. 1355, (Ill. 1992). (Emphasis in the original.) (Internal citations omitted.)

The Court of Appeals also cited the Texas case, *Munters Corp. v. Swissco-Young Industries, Inc.*, 100 S.W.3d 292 (Tex. 2002) holding that misrepresentations as to future events or conduct are actionable under the consumer protection statute as long as the statements are specific and not mere "puffing."

That Court examined three factors in determining if the statement was actionable or "puffing." The first factor is whether the promise was general or specific. *Id.* at 298. The second factor is whether there is "superior knowledge of a seller, in conjunction with the buyer's relative ignorance," and the third is whether the promise was of a present condition or future performance, but noting that a promise of future performance is actionable under the Texas consumer protection act. *Id.*

In the present case, the promise was quite specific: financing at no more than 8% with monthly payments of no more than $250 per month. Furthermore, there was a dramatic discrepancy in knowledge and business sophistication between the parties. Piles and Warner were young and financially vulnerable. They went to the car lot to see a 1997 Ford Mustang advertised for $4950 with payments of $109 per month. They were told it was still on the lot when it was not. They were steered to a $14,000 Camaro and when they expressed concern about the expense, the salesman guaranteed he could get them financed. This guarantee was made after he had taken their

driver's licenses to supposedly check what kind of financing he could get for them. He had them sign a purchase agreement and discussed the sale on the phone with the general manager, getting her approval before allowing the Appellees to take the Camaro home. Piles and Warner were clearly at a disadvantage in this transaction.

An argument similar to Appellant's here – that the elements of fraud must also be present in a consumer protection action - was raised in *Lorenzetti v. Jolles*, 120 F. Supp 2d 181 (D. Conn. 2000) and rejected by the Court. In that case – a legal malpractice case against an attorney for settling a case against a bank without permission – the jury was asked to determine whether the plaintiff would have prevailed in the underlying claims against the bank. The jury found that the plaintiff would have prevailed on his Connecticut Unfair Trade Practices Act (CUPTA) claim[3] but not on his breach of contract and breach of fiduciary duty claims. The defendant argued that CUPTA liability could not stand alone.

The Court disagreed.

> as noted by the Connecticut Supreme Court, "the action established by CUTPA **provides a remedy for a wider range of business conduct than does the common law**, and CUTPA **exists wholly independent of any common law claim**." Associated Investment Company Limited Partnership v. Williams Associates IV, 230 Conn. 148, 161 (1994).The language of the statute does not define the scope of unfair or deceptive acts

[3] Sec. *42-110b*. No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.

> proscribed, and interpreting courts have determined that this omission was purposeful, **to allow courts to develop a body of law responsive to marketplace practices** that actually generate such complaints. . See, e. g., Sportsmen's Boating Corp. v. Hensley, **192 Conn. 747, 755** (1984). That these practices **may not be actionable under the rubric of traditional common law remedies does not foreclose an action** under CUTPA, because there is "no . . . unfair method of competition, or unfair [or] deceptive act or practice that cannot be reached [under CUTPA]." Conn. Joint Standing Committee Hearings, General Law, Pt. 2, 1973 Sess., p. 705, remarks of Attorney Robert Sils, Dept. of Consumer Protection.

Id.

Kentucky courts as well have found that the KCPA was meant "to give Kentucky consumers the broadest possible protection for allegedly illegal acts." *Stevens, supra,* at 821. The tort of fraud existed at the time the KCPA legislation was passed. If the legislature had believed it was sufficiently broad to protect consumers, it did not have to enact the comprehensive consumer protection that it did. "It is to be presumed . . . that the legislature is acquainted with the law, that it has knowledge of the state of the law on subjects on which it legislates." *Commonwealth v. Boarman,* 610 S.W.2d 922, 924 (Ky.App.1980) (statute abrogating spousal privilege applied to all judicial proceedings involving child abuse).

The broad language of the KCPA and the intent of the legislature mandate the conclusion that the strict elements of common law fraud do not similarly restrict a KCPA action.

B. SONNY BISHOP COMMITTED A MULTITUDE OF WRONGFUL ACTS IN ADDITION TO ITS MISREPRESENTATION OF FINANCING THAT THE JURY COULD REASONABLY FIND VIOLATED THE KCPA

As the Court of Appeals correctly stated, "fraud is not the only act or conduct that the legislature deemed unlawful. The Act prohibits any act or conduct that is unfair, deceptive, or misleading." Opinion of the Court of Appeals at p. 11. The KCPA instructions asked whether the jury believed from the evidence "that Sonny Bishop Cars engaged in false, unfair, misleading or deceptive act(s) or practice(s) in the conduct of its business dealings with (Appellees)." As stated in *Dare To Be Great, Inc. v. Com. Ex Rel. Hancock,* 511 S.W.2d 224, 227 (Ky. 1974): "We are of the opinion that the words *false, misleading* and *deceptive* have meanings which are generally well understood by those who want to understand them." The jurors here are presumed to have understood the instructions, and they unanimously found Sonny Bishop violated the Act.

The instructions did not limit the jury to consider only the promises about the financing that would be provided but whether it had engaged in an act or acts prohibited by statute. Appellant did not request that the jury be required to specify the acts or practices it found in violation. The jury had many to choose from. As recounted in great detail above, Appellant engaged in a myriad of unfair, misleading and deceptive practices in its dealings with Appellees; the "guarantee" of financing was merely one.

The jury, after listening to several days of testimony, found that Sonny Bishop committed unfair, deceptive and or misleading act(s) in its business dealings with Appellees and the jury's findings must be given great deference.

> **The role of the jury in interpreting the evidence and finding the ultimate facts is an American tradition so fundamental as to merit constitutional recognition.** U.S. Const. Amend. VII; Ky. Const. Sec. 7. The **conscience of the community** speaks through the verdict of the jury, not the judge's view of the evidence. It may well be that deciding when to take a case away from the jury is a matter of degree, a line drawn in sand, but this is all the more reason why **the judiciary should be careful not to overstep the line.**

Horton v. Union Light, Heat and Power Co., 690 S.W.2d 382, 385 (Ky. 1985).

There was sufficient evidence and the jury could reasonably find that Sonny Bishop lured Appellees to the lot by lying about the availability of the Mustang it had advertised; steered them to the Camaro three times the price; obtained Warner's signature on the title of his Nissan; later had a notary falsely swear to Warner's signature so the Nissan could be sold without permission; converted Warner's trade-in by selling it before the financing was finalized; lied about selling the trade-in; attempted to bully Appellees into giving Appellant more money; and ultimately threatened to "repossess" the Camaro if Appellees did not come up with the full cash price.

Based upon its review of the facts, the Court of Appeals found, and Appellees agree that it was "reasonable for the jury to conclude that the

entire transaction between the parties was fraught with deception. . . " (Opinion of the Court of Appeals at p. 16) The Court should not disturb the jury's well-supported verdict.

III. THE PUNITIVE DAMAGES INSTRUCTION WAS PROPER

Appellant argues that because the Court of Appeals held that the fraud claim should not have been submitted to the jury, than the punitive damages instruction that included fraud along with the KCPA and conversion claims was reversible error. Bootstrapped to that argument, Appellant presumes that the KCPA claim will fail, and then argues that the finding that Appellant converted Warner's vehicle by itself could not fairly support the award of punitive damages.

Although Appellees should prevail on their fraud and KCPA claims as well, the conversion claim alone, which has not been challenged, supports the jury's award. The instructions to the jury insured that it would not award punitive damages without the requisite finding of culpability.

The common law definition and purpose of punitive damages was explained in *Ashland Dry Goods Co. v. Wages,* 302 Ky. 577, 195 S.W.2d 312 (1946)

> Punitive damages are damages other than compensatory or nominal damages, awarded against a person **to punish him for his outrageous conduct.** The purpose of awarding punitive damages, sometimes called "smart money", is to punish the person doing the wrongful act **and to discourage such person and others from similar conduct in the future.** Such

> damages are proper **only when the wrongful act is wanton, malicious, or reckless**. There must be a showing that the acts were either **willful or malicious or that they were performed in such a way as would indicate a gross neglect or disregard for the rights** of the person wronged.

Id at 582-583. (Emphases added and citations omitted.)

The Court properly instructed the jury on the award of punitive damages (Instruction No.9) by requiring that they find "by clear and convincing evidence that Sonny Bishop Cars acted towards Ms. Piles and Mr. Warner intentionally, with fraud, oppression or with reckless indifference to their rights." These instructions comport with the holding of this Court in *Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998); recited the necessary instructions to award punitive damages against a corporation; and listed the statutory factors that should be considered.

Appellant's conversion of Warner's property, in and of itself, is sufficient to support the award of punitive damages. As the evidence showed, this was no accidental taking. Sonny Bishop intentionally and deliberately sold Warner's vehicle without his permission. It had his signature notarized by someone who did not witness it in order to facilitate the sale and then Sonny Bishop concealed its actions by repeatedly lying to Appellees, leading them to believe that the vehicle was still in its possession, knowing it was not.

> **It is well established that punitive damages may be recovered in an action for conversion if the defendant's conduct is sufficiently**

> **egregious.** *Hensley v. Paul Miller Ford, Inc.*, Ky., 508 S.W.2d 759, 762 (1974). To recover punitives, there must be a finding that **the defendant acted with malice, whether actual or implied.** Implied malice is conscious wrongdoing. *Fowler v. Mantooth*, Ky., 683 S.W.2d 250, 252 (1984). In determining whether to make such an award, the trier of fact may consider the character of the defendant and the nature and extent of the harm to the plaintiff. In analyzing the character of the defendant's act, **the trier may consider its outrageousness, defendant's extent of culpability and motives, the relationship between the parties, and the existence or absence of provocation**. *Id.* at 253.

First And Farmers Bank v. Henderson, 763 S.W.2d 137 (Ky.App. 1988)

There was overwhelming evidence that the conversion was undertaken with implied if not actual malice. As the *Williams* court stated: the "wanton or reckless disregard for the lives, safety or property of others," standard enunciated in *Horton, supra*, "bears an element not distinguishable from malice implied from the facts." *Williams, supra* at 263-264.

Moreover, in considering the propriety of punitive damages awards, it is the conduct of the wrongdoer that is the proper focus of the jury's inquiry, not the name of the tort. *Cf. Roberie v. VonBokern*, ___ S.W.3d ___, 2006 WL 2454647 (Ky. 2006), (Quiet Title claim submitted to jury; punitive damages upheld for tort of public nuisance.) The instructions given to the jury in the present case precluded the jury from improperly awarding punitive damages by requiring the jurors to find the requisite intent.

"(I)f there was ***any evidence*** to support an award of punitive damages, (Plaintiffs have) a right to have the jury instructed on the

option to award punitive damages." *Shortridge v. Rice*, 929 S.W.2d 194, 197 (Ky.App. 1996) The Appellant did not request an instruction that separated the punitive damages claims nor did it request interrogatories that would have delineated the jury's findings. The jury received proper instructions and the evidence supports it verdict.

IV. THE PUNITIVE DAMAGES AWARDED WERE NOT EXCESSIVE

A. STANDARD OF REVIEW

The standard for reviewing punitive damages award is twofold. First, the trial court, which has listened first-hand to all of the evidence and observed the proceedings must determine whether the verdict was tainted by "the influence of passion or prejudice." *Burgess v. Taylor*, 44 S.W.3d 806, 813 (Ky. App. 2001). The trial court's decision "is a question dependent on the nature of the underlying evidence." Therefore, the standard of appellate review is whether the trial court abused its discretion. *Id.* The evidence in this case is rife with proof of Appellant's malicious misconduct. The trial court's decision to allow the punitive damage award to stand was not an abuse of discretion.

Second, the Appellate Court may also review the award of punitive damages *de novo* to determine whether it is so grossly excessive that the defendant has been denied due process of law. *Phelps v. Louisville Water Company*, 103 S.W.3d 46 (Ky. 2003), citing *BMW of North America, Inc. v.*

Gore, 517 U.S. 559 (1996). The punitive damages award here passes both reviews.

B. DUE PROCESS GUIDEPOSTS

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the United States Supreme Court held that the Due Process Clause is violated when punitive damages are "grossly excessive" in relation to the State's "legitimate interests in punishing unlawful conduct and deterring its repetition." *Id* at 568. In the instant case, the awarded damages are well within Constitutional boundaries.

Gore provided a roadmap for ascertaining what is grossly excessive on a case-by-case basis. It looked to three factors: "the degree of Reprehensibility . . . ; the disparity between the harm or potential harm suffered . . . and (the) punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases." *Id* at 575.

The degree of reprehensibility of the conduct is "(p)erhaps the most important indicium of the reasonableness of a punitive damages award. . . ." *Id.* "(T)rickery and deceit are more reprehensible than negligence." *Id* at 576. (Internal citation omitted.)

The United States Supreme Court has explained that a court should consider the following in analyzing the reprehensibility of a defendant's conduct:

> "[(1) whether] the harm caused was physical as opposed to economic; [(2) whether] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [(3) whether] the target of the conduct had financial vulnerability; [(4) whether] the conduct involved repeated actions or was an isolated incident; and [(5) whether] the harm was the result of intentional malice, trickery, or deceit, or mere accident."

State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 419 2003).

In the present case, the misconduct did not involve physical harm or indifference to safety, but the *Gore* Court did not rule out the possibility that economic harm alone would support a large award of punitive damages. "To be sure, infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty." *Gore* at 576. (Internal citation omitted.)

Factor three is applicable – Warner and Piles were young and financially vulnerable to Sonny Bishop's web of deceit. Factor four applies here as well. Weeks went by while Sonny Bishop continued to spin its lies and deceive the Appellees. The Appellees returned time and again to unwind the transaction and retrieve their trade in, and Sonny Bishop continued to lie about the sale of the trade-in and attempted to extort more money and to bully them into buying the Camaro.

The fifth factor is also present. As the Court of Appeals pointed out, there would have been no damages from its lies if Sonny Bishop had just returned the trade-in when it could not obtain the loan at the promised rates.

(Opinion of the Court of Appeals at 13.) Even had the Appellant disclosed to Warner and Piles up-front it had mistakenly sold the vehicle and tried to make amends, the reprehensibility might have been lessened. Instead, it embarked upon deliberate and deceitful acts to hide the conversion and force the sale.

In *Gore* the Court found that the conduct of BMW was not particularly reprehensible- the failure to disclose a minor paint job was not a two million dollar offense; however, the Court, but applying the Campbell factors to this case inevitably leads to the conclusion that Sonny Bishop engaged in reprehensible behavior.

Appellant's contention that Sonny Bishop at all times acted in good faith and "did everything possible to keep Piles and Warner in the vehicle" is just not supported by the evidence nor believed by the jury. Its attempt to ascribe a benign business motive to camouflage its desperate and deceitful acts just cannot and were not believed.

The second guidepost that the *Gore* Court examined was ratio of actual harm to the punitive damages. *Gore* struck down a 500-1 ratio but declined to provide an exact mathematical formula. *Id* at 582.

> Indeed, **low awards of compensatory damages may properly support a higher ratio** than high compensatory awards, if, **for example, a particularly egregious act has resulted in only a small amount of economic damages.** A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.

Id. (Emphasis added.)

This Court in *Roberie v. Vonbokern, supra,* thoroughly reviewed and discussed the U.S. Supreme Court jurisprudence on punitive damages, and upheld a punitive damages award of $5,000 in a case in which no compensatory damages were awarded. The Court concluded that "(t)he benchmark is whether the award was reasonable in light of and proportionate to the conduct of the defendants." *Id* at In reaching its decision that Due Process was not violated, the Court cited to a case from the Fifth Circuit Court of Appeals upholding a ratio of 150-1 [*Williams v. Kaufman* County, 352 F.3d 994, 1016 (5th Cir. 2003]and a case from the Second Circuit upholding a ratio of 10,000-1 [*Provost v. City of Newburgh*, 262 F.3d 146, 164 (2d Cir. 2001)].

This Court in *Roberie, supra*, as noted, applied the *Gore* guideposts and Court upheld the jury's award of punitive damages, even though the ratio was virtually 5000-1. In comparison, the ratio in the present case of 12-1 is restrained. The misconduct of the Appellant in this case was certainly at least comparable to the degree of misconduct in *Roberie*. In fact, Appellees submit that Appellant's behavior, here, was more reprehensible because of the gross inequality in the sophistication of the parties: Appellant - a business- as opposed to the two young and financially vulnerable customers it deceived. Roberie blocked access to a road and engaged in harassing behavior. In the present case, Appellant lied, forged documents, harassed and

converted property. As stated by the Court of Appeals, "Although the harm caused was small, it was caused by Sonny's deliberate and deceitful acts." p. 17.

The third guidepost in *Gore,* and a factor that was non-existent in *Roberie v. Vonbokern, supra,* is a comparison "between the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." *Gore* at 583.

Gore specifically notes that similar criminal conduct that can result in incarceration may be substituted as a consideration in this third element. The actions of Sonny Bishop are comparable to several criminal laws in Kentucky that could result in incarceration: KRS 516.030, Forgery in the second degree, KRS 514.040, Theft by deception, and KRS 517.110, Misapplication of entrusted property.

The Oregon Supreme Court, in applying the third *Gore* guidepost, also considered the potential loss of a business license. *Parrott v. Carr Chevrolet, Inc.,* 331 Or. 537, 564, 17 P. 3d 473 (2001) Under Kentucky law, Sonny Bishop similarly was subject to administrative penalties for its actions that could include suspension or loss or its business license.

> KRS 190.040 Grounds for denial, suspension, or revocation of license -- Notice of denial of application for license -- Hearings -- Inspection of licensee's records -- Appeals from order of commission.
> (1) A license may be denied, suspended, or revoked on the following grounds:
> (a) Proof of financial or moral unfitness of applicant;
> (b) Material misstatement in application for license;

> (c) Filing a materially false or fraudulent tax return as certified by the Revenue Cabinet;
> (d) Willful failure to comply with any provision of this chapter or any administrative regulation promulgated under this chapter;
> (e) Willfully defrauding any retail buyer to the buyer's damage;
> (f) Willful failure to perform any written agreement with any buyer;
> (g) Failure or refusal to furnish and keep in force any bond required;
> (h) Having made a fraudulent sale, transaction, or repossession;
> (i) False or misleading advertising;
> (j) Fraudulent misrepresentation, circumvention, or concealment through subterfuge or device of any of the material particulars or the nature of them required to be stated or furnished to the retail buyer;

As the *Parrott* Court found:

> a regulatory scheme of sanctions that includes interruption or closure of business operations provides sufficient notice to a business defendant that its violation of the law could have serious economic consequences.

Appellees pass the third *Gore* guidepost.

C. PUBLIC INTEREST

An additional overriding factor that the Court should consider is the important public interest involved. As pointed out by the Court of Appeals in its Opinion below, "the business dealings between car dealers and the public are of sufficient public interest that unlawful and tortuous acts must be deterred." p. 17.

> KRS 190.015. Public policy declared.
>
> The Legislature finds and declares that the distribution and sale of vehicles within this state

> vitally affects the general economy of the state and the public interest and the public welfare, and that in order to promote the public interest and public welfare, and in the exercise of its police power, it is necessary to regulate and license vehicle manufacturers, distributors or wholesalers, brokers and auctioneers, and factory or distributor representatives, and to regulate and license dealers of vehicles doing business in this state, **in order to prevent frauds, impositions, and other abuses upon its citizens, and to protect and preserve the investments and properties of the citizens of this state.**

D. SUMMARY

All of these guideposts and factors must be placed within the context of the underlying purposes of punitive damages: punishment and deterrence, the second of which is perhaps even more widely emphasized in the case law.

See, e.g., State Farm, at 416 (quoting *Gore*, that "punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition"); *Kemp v. American Telephone & Telegraph Company,* 393 F.3d 1354, 1363-5 (11th Cir. 2004) (A T & T billed customer for improper charges disguised as long distance charges, as part of a wide practice; upholding award of $115.05 actual damages, $250,000 punitive damages, 2,172-to-1, because a lesser punitive damages award "would utterly fail to serve the traditional purposes underlying an award of punitive damages, which are to punish and deter"). *Parrott, supra,* (used vehicle with undisclosed damage and other defects; upholding $11,496 in actual damages, $1,000,000 in punitive damages, saying "we focus our attention on the scope of Oregon's legitimate interests in punishing

defendant and deterring it from future misconduct".)

As the *Roberie* court reminded us, citing *Horton v. Union Light, Heat and Power Co.*, 690 S.W.2d 382, 385 (Ky. 1985), "[A]n appellate court must not substitute its findings of fact for those of the jury if there is evidence to support them."

The jury heard the evidence, found the required intent and awarded punitive damages. There was ample evidence to support the verdict. Considering the reprehensibility of Sonny Bishop, the small amount of actual damages and the moderate ratio and overall amount awarded; the potential criminal penalties and administrative action that could lead to a loss of license to conduct business; the declared public interest in regulating car dealers in their interactions with consumers, and the need to deter Sonny Bishop and all other car dealers from engaging in fraudulent and deceptive behavior, it cannot be said that the punitive damages award is excessive.

ARGUMENTS ON CROSS APPEAL

I. A CLAIM OF MISREPRESENTATION BASED UPON THE PROMISE OF A FUTURE ACT IS ACTIONABLE WHERE THERE IS NO PRESENT INTENT TO PERFORM

This particular issue was not properly before the Court of Appeals as it was raised for the first time in the Opinion of the Court of Appeals. The issue was preserved by Cross-Appellants in their Cross-Motion for Discretionary Review.

The Court of Appeals reversed the judgment of fraud in this case based upon the mantra that a misrepresentation as to a future event can never constitute fraud. This is an incomplete statement of the law.

The Court of Appeals overlooked Restatement (Second) of Torts § 530 (1) (1977), a "representation of the maker's own intention to do or not to do a particular thing is fraudulent if he does not have that intention." Furthermore, Restatement (Second) of Torts § 530 (1) (1977), cmt c. states: "Since a promise necessarily carries with it the implied assertion of an intention to perform it follows that a promise made without such an intention is fraudulent and actionable in deceit under the rule stated in § 525."

The Kentucky Supreme Court cited to this section of the Restatement in upholding a judgment of fraud based upon a future promise to perform in *Hanson v. Am. Nat. Bank & Trust Co.*, 865 S.W.2d 302 (Ky. 1993)[4]. In that case, the Defendant bank made promises to Hanson in order to induce him to restructure his loan. The bank promised that it would provide him a line of credit, would provide partial financing to him in the future and would allow him 15 years to repay the restructured loan. The bank reneged on those promises and Hanson sued.

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[4] In Sandhill 1, *Sand Hill Energy v. Ford Motor Company*, 83 S.W.3d 483 (Ky. 2002), the court overruled that part of *Hanson* that held that there was no authority for a court-ordered remittitur in Kentucky. "It is now clear that the majority of this Court is incapable of enforcing the constitutional restraints against excessive punitive damages verdicts in this jurisdiction." *Id* at 514

The Court rejected the bank's argument that the promised terms were too indefinite to serve as consideration for the contract. The Court found that promises that might not be enforceable as contract terms may still constitute a cause of action for fraudulent inducement.

In the present case, it is clear, and the jury found, that Appellant made misrepresentations. The evidence supports the jury's findings. The Appellees went to the car lot to look at the Mustang advertised for $4950. They had serious doubts that they expressed to Summitt the salesman about their ability to afford the $14,000 Camaro he steered them to. It was only because Summitt reassured them by telling them he "guaranteed" he could get them financed that they left the lot with that car.

Perhaps in isolation, an argument could be made that a "guarantee" in and of itself is puffing; however, the misrepresentations were more specific. Appellees were concerned about its affordability and told Summitt that they had no cash down payment, that they did not want an interest rate above 8% and that they must have monthly payments of no more than $250. These statements were made after Summitt took the Appellees drivers licenses so that he could run their credit to get an idea what he could do for them as far as financing.

Summitt didn't care if he could deliver, because he knew that once they drove away and he controlled the trade in, they wouldn't be shopping elsewhere, and he believed he could have his way with this unsophisticated couple.

The Appellant has emphasized that Summitt was not in charge of financing and that the Appellees were aware he was not in charge of financing; however, the Appellant omits critical facts from the scenario. It is undisputed that Ferguson, the General Manager, was authorized to provide financing and that the Appellees knew that Summitt was consulting with Bishop by telephone. Ferguson made the decision to allow the Appellees to take the Camaro off the lot that night. It was reasonable for Appellees to believe that Summitt was authorized to make the promises he made.

The appellate court may not merely second-guess the decision of the trial court to deny a motion for directed verdict. Its review is "limited to a determination of whether the jury's verdict was palpably or flagrantly contrary to the evidence presented at trial." *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 787 (Ky., 2005) The Kentucky Supreme Court, in *Stringer*, elaborated on the appropriate standard of review:

> **All evidence which favors the prevailing party must be taken as true** and the reviewing court is **not at liberty to determine credibility or the weight** which should be given to the evidence, these being functions reserved to the trier of fact. The **prevailing party is entitled to all reasonable inferences** which may be drawn from the evidence.

Id. (Citations omitted and emphases added.) The evidence of fraud in this case is abundant.

The six elements of fraud are as follows: "a) material representation 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. *Wahba v. Don Corlett Motors. Inc.*, Ky. App., 573 S.W.2d 357, 359 (1978)." *United Parcel Service Co., v. Rickert,* 996 S.W.2d 464, 468 (Ky. 1999) According to the Restatement (Second) of Torts § 530 (1) (1977),

Rickert requires this court to "accept the evidence as true, draw all reasonable inferences from it in favor of the claimant, refrain from questioning the credibility of the witnesses of the claimant and refrain from assessing the weight that should be given to any particular item of evidence." *Id.* (Internal citation omitted.) Moreover,

> such proof may be developed by the character of the testimony, the coherency of the entire case as well as the documents, circumstances and facts presented. Fraud may be established by evidence which is wholly circumstantial.

Id.

The evidence of fraud in this case more than meets these requirements. Appellant misrepresented to Appellees that it would provide ("guarantee") financing at specified terms and it misrepresented the terms of that financing either intentionally or recklessly without regard to whether or not the statements were true. This information was untrue and there is sufficient evidentiary support for the jury's decision. The misstatements were made in order to induce the Appellees to enter into an agreement for the purchase of the Camaro and turn over Warner's Nissan as part of the deal. Appellees acted in reliance upon the misstatements and they were injured thereby.

And even though the misrepresentations concerned a future event, it was reasonable for the jury to believe that Appellant had no intention whatsoever of performing, but that he made these statements merely to induce the Appellees to enter into the agreement. Pam Ferguson admitted that Summitt was not authorized nor qualified to do the financing. This admission alone is sufficient proof that when Summitt told this young couple he could get the financing on the terms they wanted, he had no idea whatsoever whether his statements were accurate. He did not have any present intent to keep that promise. This is actionable fraud in Kentucky and elsewhere.

The First Circuit Court of Appeals, reviewing a case from Bankruptcy Court discussed this type of fraudulent misrepresentation.

> Under the traditional common law rule, a defendant will be liable if (1) he makes a false representation, (2) he does so with fraudulent intent, i.e., with "scienter," (3) he intends to induce the plaintiff to rely on the misrepresentation, and (4)the misrepresentation does induce reliance, (5) which is justifiable, and (6) which causes damage (pecuniary loss). 2 F. Harper, et al., Law of Torts Section(s) 7.1, at 381 (2d ed. 1986; Restatement (Second) of Torts Section(s) 525 (1977). **Regarding the first element, the concept of misrepresentation includes a false representation as to one's intention, such as a promise to act.** "A representation of the maker's own intention to do . . . a particular thing is fraudulent if he does not have that intention" at the time he makes the representation. Restatement (Second) of Torts Section(s) 530(1); see Anastas v. American Sav. Bank (In re Anastas), 94 F.3d 1280, 1285 (9th Cir.1996). **"The state of a man's mind is as much a fact as the state of his digestion." Restatement (Second) of Torts Section(s) 530 cmt. a.** Likewise, **"a promise made without the intent to perform it is held to be a sufficient basis for an action of deceit." W. Page**

> **Keeton, et al., Prosser and Keeton on the Law of Torts** Section(s) 109, at 763 (5th ed. 1984) (footnotes omitted); see Restatement (Second) of Torts Section(s) 530(1) cmt. c.

Palmacci v. Umpierrez, 121 F.3d 781, 786-787 (1st Cir. 1997) (Emphasis added.)

The Court of Appeals erroneously interpreted *McHargue v. Fayette Coal & Feed Company,* 283 S.W.2d 170 (Ky. 1955) and *Rivermont Inn v. Bass Hotels, Inc. & Resorts Inc.*, 113 S.W.3d 636 (Ky.App. 2003) as holding that a misrepresentation about the occurrence of a future event could never amount to fraud, without regard to the motive and mental state of the maker of the promise.

In *McHargue, supra*, the misrepresentations were statements by a salesman about the efficiency and value of certain dairy farm equipment. The Court found these statements amounted to "nothing more than 'sales talk' or 'puffing' which is universal and an expected practice." *Id* at 172. The Court also found significant that the purchaser (unlike Appellees, herein) was an "experienced dairyman" and that he had "equal means of information." *Id.*

Likewise, the holding of the Court of Appeals case, *Rivermont Inn, supra,* does not support the blanket proposition that a promise to perform a future act can never be actionable fraud. The holding of the Court of Appeals in that case was much narrower. The *Rivermont Inn* Court delineated its holding as follows: "that as a matter of law, a party may not rely on oral representations that conflict with written disclaimers to the contrary which the complaining party earlier specifically acknowledged in writing . . . ." *Id* at

640. This case is also distinguishable for involving businesses of equal bargaining power.

II. INCONVENIENCE DAMAGES ARE ALLOWABLE

Inconvenience damages are not unheard of in Kentucky, but are merely a type of consequential damage that may be awarded in appropriate circumstances. "In an action in tort, the damages recoverable are such as actually flow from the wrongful act, although the particular consequences may not have been contemplated when the wrongful act was committed." *Western Union Tel. Co. v. Guard*, 283 Ky. 187; 139 S.W.2d 722, 728. (1940)

> whenever a person is injured in his person or property by the wrongful act of another, he is entitled to recover such a sum as will fairly compensate him, not only for the actual loss sustained, but for such consequential damages as may spring from the deprivation of business or profits as are the direct or proximate result of the tort complained of, if such consequential damages are capable of reasonable ascertainment, and in addition thereto the facts justifying it, **compensation for personal inconvenience and discomfort.**

Ky. Heating Co. v. Hood, Ky., 133 Ky. 383, 388; 118 S.W. 337 (1909)

In this case Warner and Piles both testified about the trips back and forth to the dealer that they were required to make – Piles all the way from another county. Warner testified that he was deprived of transportation and had to rely upon Piles and his mother and others to get him to school and to work. He testified that he even had to quit school because the transportation became so difficult. (TR Tape 10:32:39-10:36) Piles testified to the difficulties

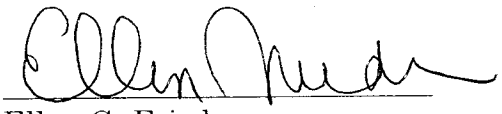
she was having at work from the constant telephoning and missed work hours.

These are damages that are not easy to quantify monetarily, yet they are injuries nonetheless. It was within the province of the jury to award the modest amounts provided.

CONCLUSION

Because of the foregoing arguments, the Appellees pray this court affirm the judgment of the Jefferson Circuit Court, and affirming in part and reversing in part the Opinion of the Court of Appeals. Should Appellees be successful in this appeal, they also request that the case be remanded to the trial court to determine if additional attorney's fees should be awarded pursuant to the Kentucky Consumer Protection Act. KRS 367.20(3).

Respectfully submitted,



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