COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2005-SC-000999-DG
C/W No. 2006-SC-432-DG



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

V.

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

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

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# REPLY BRIEF FOR APPELLEES/CROSS-APPELLANTS, CHRISTY PILES, CHARLES WARNER and ELLEN G. FRIEDMAN

Submitted by:

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## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was on the 5th day of March 2007, mailed to Hon. Sam Givens. Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, Kentucky 40601-9220; Clerk, Jefferson Circuit Court, The Judicial Center, 700 W. Jefferson St., Louisville, KY 40202; Hon. Steve K. Mershon, Jefferson Circuit Judge, The Judicial Center, 700 W. Jefferson St., Louisville, KY 40202; Hon. Fred E. Fischer and Hon. Mike Kelly. Counsel for Appellant, 718 West Main Street, Two South, Louisville, KY 40202; and Hon. Todd E. Leatherman and Hon. Mary Ellen B. Mynear, Kentucky Attorney General, office of Consumer Protection, 1024 Capital Center Drive, Suite 200, Frankfort, Kentucky 40601.

ELLEN G. FRIEDMAN

## STATEMENT OF POINTS AND AUTHORITIES

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## ARGUMENTS

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### I. THE FACTS IN THIS CASE SUPPORT THE JURY'S FINDINGS OF COMMON LAW MISREPRESENTATION

#### A. THE FRAMEWORK OF SPOT DELIVERY FRAUD: THE DEALER PROVIDES THE FINANCING

The Court of Appeals found and the Appellant ("Sonny Bishop") argues that it cannot be held responsible for the false promises made by salesman Glenn Summitt ("Summitt"), primarily on two grounds: first, that his statements were mere predictions of the financing that a third-party finance company might provide (future events not within the control of Sonny Bishop) and second, that Summitt was not authorized to handle financing and the Appellees ("Piles" and "Warner") were aware that he was not so authorized. However, an understanding the framework of spot delivery transactions and consideration of additional facts and circumstances presented to the jury belie the sophistry of Appellant's arguments.

Expert witness Ken Woods, who had twenty-eight years in virtually all aspects of auto sales, testified that the transaction in this case is known as a "spot delivery." (TR Tape 1-16:18:35) [A spot delivery transaction is also known as a "yo-yo" transaction or "gimme-back" or "MacArthur" ("I shall return"). National Consumer Law Center, *Unfair and Deceptive Acts and Practices*, § 4.4.5.1 (6th Edition 2004), which was included in the Appendix to Brief for Appellees.] Mr. Woods explained the reasons that dealers spot deliver cars and how such transactions are supposed to work. (TR Tape 1-16:35 – 47:00)

There are three primary documents that set up a spot delivery transaction: a purchase agreement, also known as a buy-sell agreement; a retail installment contract ("RIC"); and a spot delivery affidavit. In this case, only the vehicle purchase agreement (P Ex 7)[1] and the spot delivery affidavit (P Ex 8) were completed by Sonny Bishop. A sample of a typical RIC used in the industry was introduced as P Ex 15. (P Ex 7, 9 and 15, as well as P Ex 5, are attached hereto in the Appendix.)

According to Mr. Woods, the purchase agreement is the document that memorializes the agreed upon purchase price. The information on that buy-sell agreement is typically sent to a finance company along with the credit application. (TR Tape 1-30:00)

The RIC provides the financing terms of the credit sale. It is a contract between the seller and the buyer in which the seller agrees to finance the purchase on specific credit terms – it includes such information as the annual percentage rate and number and amount of periodic payments. (TR Tape 1-6:35:40) Piles testified that Summitt tried to obtain her signature on a blank RIC telling her that the terms of financing would be filled in later, but she refused to sign it. (TR Tape 2-13:37)

Specifically because the dealer is bound by the terms of the financing it promises, it also has customers sign the affidavit of spot delivery. As Ken Woods testified, a spot delivery affidavit is a protection for the dealer. It is the dealer's opportunity to renege on the financing agreement and get the car

[1] There appears to be a discrepancy in the numbering of the exhibits used by Appellant in its Brief and the numbering on the exhibits as they were admitted into evidence at trial. Appellee is using the identification numbers given at trial.

back should it not be able to convince a finance company to buy the contract for the amount of money the dealer wants to make on the deal; typically this occurs within three days. (TR Tape 1-16:56:45 – 16:58) The spot delivery affidavit here required Piles to return the Camaro to Sonny Bishop if at the end of three days Sonny Bishop could not find the financing deal it wanted and Piles could not find financing on her own.

> "(T)he dealer is the originating creditor extending the installment loan to the consumer. The dealer is then seeking to sell that installment sales contract to a lender. . . . (I)n our credit market, **the dealer can always find a buyer for the installment loan.** The only question is whether the dealer will have to sell the loan at a loss, will break even, or whether it can make a profit selling the loan. Because dealers often make a profit selling the paper, another way to re-phrase the dealer's justification for canceling the sale is that the dealer could not sell the loan paper at a profit, and thus wants to back out of the deal."

National Consumer Law Center, *Unfair and Deceptive Acts and Practices*, § 4.4.5.1 (6th Edition 2004) (Emphasis added.)

Sonny Bishop's assertion that it was only arranging financing - merely "predicting what a third party finance company would do in the future" is simply untrue. Expert Ken Woods explained that the deal is between the customer and the dealer (TR Tape 1-16:56:45), that it is the dealer that agrees to provide the financing. (TR Tape 1-16:46:40) Even Ferguson, Sonny Bishop's General Manager, admitted at trial that Onyx Finance Company ("Onyx") buys their contracts, (TR Tape 1-13:51) and Sonny Bishop makes a profit from the sale of its contracts to Onyx. (TR Tape 1-13:56-57) Her

testimony is supported by Sonny Bishop's dealer agreement with Onyx. (P Ex 5)

Summitt promised Piles that Sonny Bishop would provide financing at or below specific terms – no more than 8% interest with payments of no more than $250 per month and no cash down-payment. (TR Tape 1 - 23:35) Sonny Bishop actually first submitted the necessary information to sell its contract to PNC – which according to owner Sonny Bishop – was offering 8% or 9% on car loans at that time. (TR Tape 2-16:09:25) When PNC refused to buy on those terms, the information was submitted to Onyx but Onyx also refused to provide the amount of money requested. (TR Tape 1-13:54) At that point, if the transaction had been a legitimate credit sale rather than a fraudulent scheme, the terms of the spot delivery affidavit would have allowed Sonny Bishop to call off the deal and demand the Camaro back.[2]

But this transaction was built upon the fraudulent inducement of two young and unsophisticated buyers into a situation from which Sonny Bishop believed they could not extract themselves. The promise of affordable financing was illusory. Summitt would have promised them anything to close the deal that night. He intentionally or with reckless disregard for the truth made promises without any present intent to keep them. His statements were legally cognizable misrepresentations by virtue of *Hanson v. Am. Nat.*

[2] Spot deliveries are prohibited or have been found to be deceptive on their face in some jurisdictions. See, e.g. *Singleton v. Stokes Motors, Inc.*, 595 S.E.2d 461 (S.C.2004)

*Bank & Trust Co.*, 865 S.W. 2d 302 (Ky. 1993) and Restatement (Second) of Torts § 530 (1) (1977).

As Sonny Bishop acknowledged in its Reply Brief, one of the significant factors in *Hanson* was that prior to making the representations, the wrong-doer had in place "a game plan." Sonny Bishop had a game plan too, a plan to take advantage of Warner and Piles, to sell them a car it knew they couldn't afford by making promises it knew it couldn't keep.

B. SUMMITT WAS ACTING FOR PAMELA BISHOP FERGUSON – THE GENERAL MANAGER AND WAS HER AUTHORIZED AGENT

The second erroneous premise for reversing the trial court's judgment on the fraud count was that Summitt was not authorized to handle the financing and that Piles knew he was not so authorized. These facts alone, taken out of context do not support the Court of Appeals' conclusion or Sonny Bishop's argument. Ferguson - who was responsible for giving credit terms (TR Tape 1-15:09:50) - had numerous and extensive conversations with Summitt over the three or four hour period that Appellees were on the lot (TR Tape 1-54:48 and 1-15:58:43), and Piles and Warner were aware that Summitt was consulting with her and obtaining her approval.

By Fersuson's own admission, the reason that Summitt called her at home was because no one on the lot that night knew anything or was qualified to give information about financing. (TR Tape 1-13:42 – 13:44) According to Summitt, he was on the phone with Ferguson "constantly" the night of the sale. (TR Tape 1-15:51:30) "Off and on 'til they left." (TR Tape 1-54:48-55) This is the way Summitt described the interactions:

Q. Why would you spend so much time on the phone with (Ferguson) if it didn't make any difference to you whether they took the car home that night or not?

A. **Because of the questions they were asking me and the questions I needed to ask her after they asked me the question.** I mean, that would be like if I was working for you and I'm down the street, I can't keep running down there, so I call you, **they want to know this, can they do this.** . . .

(TR Tape 1-15:55-56)

Ferguson was an integral part of the transaction. She made the decisions and communicated her decisions back to Appellees via Summitt. For example, she decided that Warner did not have a sufficiently high credit score to obtain financing but she knew she could get Piles financed. (TR Tape 1-13:44:55 - 45:30) She decided to allow Appellees to take the Camaro with them that night as long as Piles was the borrower and had insurance. (TR Tape 1-13:59) All the while that these discussions were taking place, questions being asked, decisions being made, Summitt never told Appellees that that Ferguson would not stand behind the financing terms he promised. It was entirely reasonable for Piles and Warner to assume he was acting on Ferguson's authority.

In addition, at the request of Sonny Bishop, in the punitive damages instruction the jury was specifically told, that "you shall not assess punitive damages against Sonny Bishop Cars for any act of its agents or employees unless Sonny Bishop Cars authorized or ratified or should have anticipated the conduct in question." (Jury Instruction No. 9) In his argument before the Court, Sonny Bishop's counsel specifically stated: "This goes particularly with

regard to any promises, guarantees, or assurances supposedly made by Glenn Summit who was a non-manager employee and to the extent that he did promise, guarantee, or whatever clearly exceeded the scope of his authority. It has not ever been ratified or proved by the principal and we just think that's statutory . . . ." (TR Tape 2 - 18:01 45). Even given these specific limiting instructions, the jury determined that punitive damages were warranted, thereby making a finding that Summitt was an authorized agent acting for Sonny Bishop when making the promises.

## II. THE ACKNOWLEDGEMENT IN THE VEHICLE PURCHASE AGREEMENT DOES NOT APPLY TO THE FINANCING TERMS NOR IS IT A DEFENSE TO FRAUD

Sonny Bishop argues that the clause in the purchase agreement (P Ex 7) that states that no oral promises were made inoculates it from its fraud. That argument can not prevail. The purchase agreement is not a document that is meant to contain the terms of financing. As expert Ken Woods explained, it is a "buy-sell" agreement that merely designates the agreed upon sales price of the vehicle. (TR Tape 1-16:24) Sonny Bishop should have provided the credit terms in writing in the RIC. That document should have been prepared and given to Piles that night, but was not. (TR Tape 1-16:35:40 – 16:38) The noted clause might have been relevant to a charge by Appellees that Sonny Bishop misrepresented the purchase price, but it is clearly not applicable to override oral representations of credit terms.

In *Bryant v. Troutman,* 287 S.W.2d 918, 920 (Ky. 1956) the highest court in Kentucky held that "false and fraudulent representations made by

one of the parties to induce the other to enter into the contract, are not merged in the contract." That Court reasoned: "One cannot contract against his fraud." *Id.* at 921.

In *Rivermont Inn v. Bass Hotels & Resorts,* 113 S.W.3d 636 (Ky.App. 2003), a Court of Appeals panel distinguished *Bryant* and attempted to limit its facts to the use of parol evidence in fraudulent concealment cases, holding that "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 641.

Appellees do not agree that *Rivermont Inn* can effectively limit the holding in *Bryant*, and Appellees have previously distinguished *Rivermont Inn* from the case before this Court, still, even under the *Rivermont Inn* test, the acknowledgement clause in the present case cannot bar Appellees' misrepresentation claim. As explained above, the purchase agreement only contained written information regarding the negotiated sale price while the oral misrepresentations pertained to the credit terms. The purchase agreement that contains the acknowledgement clause does not contain any written terms that conflict with the oral misrepresentations, hence even under the holding of *Rivermont Inn* the oral misrepresentations support Appellees' misrepresentation claim.

In *Yeager v. McLellan,* 177 S.W.3d 807 (Ky. 2005) the Court noted: "One exception to the doctrine of merger states that false and fraudulent misrepresentations do not merge." (Internal citation omitted.) The

application of *Yeager* was later questioned in *Ross v. Powell,* 206 S.W.3d 327 (Ky. 2006), but at any rate, as discussed above, the merger doctrine need not be applied here as the document in question contains no contradictions.

## III. THE ISSUES OF JUSTIFIABLE RELIANCE AND AWARD OF COMBINED DAMAGES WERE NOT PRESERVED FOR APPEAL

Appellant argues that Warner and Piles were not justified in relying on the misrepresentations made to them and that Piles did not suffer harm from the fraud. Appellant did not request a directed verdict on grounds of justifiable reliance nor an instruction that reliance be justified nor that the jury make individual damages determinations for each party

In fact, the instructions were correct, Appellees' reliance justified, and Appellant failed to preserve this issue for appeal. Appellant never specifically asked for directed verdict on this ground nor did it request the addition of the word "justifiable" to the jury instructions. Counsel for Sonny Bishop even stated on the record "(Instruction) Seven is fine. " (TR – Tape 2- 17:556:00) The only objection to that instruction was the inclusion of "reckless disregard."

The jury instructions regarding fraud were taken directly from Kentucky case law. *United Parcel Service v. Rickert,* 996 S.W. 2d 464, 468 (Ky. 1999), citing *Wahba v. Don Corlett Motors, Inc., 573 S.W.2d 357, 359 (Ky. App 1978).* The instructions read as follows:

> Do you believe by clear and convincing evidence that (1) Sonny Bishop Cars made a misstatement of material fact; (2) Sonny Bishop Cars knew the misstatement was false or acted with reckless disregard for whether the statement was false; (3) Sonny Bishop Cars intended for Ms. Piles and/or Mr. Warner to rely upon its misstatement; (4) Ms. Piles and or Mr. Warner did rely upon the misstatement; and (5) Ms.

Piles and/or Mr. Warner were harmed by their reliance on the misstatement?

Justifiable reliance is not an element of fraud that is required where the misrepresentation is made with evil motive, although it is an element of negligent misrepresentation as contained in Restatement (Second) of Torts, § 552, and adopted in *Presnell Const. Managers, Inc. v. EH Const., LLC*, 134 S.W.3d 575 (Ky. 2004)

Moreover, "'(a) complaint as to instructions will not be considered when the trial court's attention was not called to the point.'" *Pipelines, Inc. v. Muhlenberg County Water District*, Ky., 465 S.W.2d 927, 932 (1971)." *Burgess v. Taylor*, 44 S.W.3d 806, 814 (Ky.App. 2001).

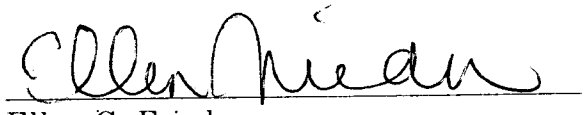
Appellant also complains that Piles was not herself damaged, but, again, Appellant did not ask that the jury be required to delineate between Piles and Warner in making its award. In fact, the jury specifically awarded $1,500 to Piles for inconvenience, an amount that Appellant argued was duplicative of the loss of use damages. Either a portion of the loss of use damages was for Piles or her inconvenience damages were not duplicative.

## CONCLUSION

Because of the foregoing arguments, the Appellees/Cross-Appellants pray this court affirm the judgment of the Jefferson Circuit Court, and affirm in part and reverse in part the Opinion of the Court of Appeals. Should Appellees prevail in this appeal on their claims under the Kentucky Consumer Protection Act, they also request that the case be remanded to the

trial court to determine if additional attorney's fees should be awarded pursuant to KRS 367.20(3).

Respectfully submitted,



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