Judgment rendered December 15, 2010
Application for rehearing may be filed
within the delay allowed by Art. 2166,
La. C.C.P.

No. 45,812-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

RACHELLE JEFFERSON — Plaintiff-Appellee

versus

LA CAR MART, LLC — Defendant-Appellant

* * * * *

Appealed from
Monroe City Court
Parish of Ouachita, Louisiana
Trial Court No. 2009CV00742

Honorable Larry D. Jefferson, Judge

* * * * *

CRAWFORD & JOYCE
By: Jefferson B. Joyce — Counsel for Appellant

ANTHONY J. BRUSCATO — Counsel for Appellee

* * * * *

Before BROWN, WILLIAMS and CARAWAY, JJ.

CARAWAY, J.

Purchaser of a used car brought redhibition action against car dealer seeking a rescission of the sale, refund of purchase price and associated costs, as well as damages for mental anguish arising from alleged deceptive trade practices. The car dealer now appeals the city court's judgment rescinding the sale and awarding a return of the sales price together with associated costs, attorneys fees, and penalties for deceptive trade practices. For the following reasons, we affirm.

Facts

On January 31, 2009, Rachelle Jefferson ("Jefferson") purchased a 2000 Ford Taurus from defendant, La. Car Mart, L.L.C. (hereinafter "Car Mart") for the total cash price of $4,700. Jefferson made an initial down payment of $1,700 and also paid a portion of the tax, title, and license. Car Mart financed the remaining $3,599.64 pursuant to financing terms contained in the bill of sale. The terms of the agreement provided for monthly installment payments to be paid to Car Mart beginning March 1, 2009. On March 6, 2009, Jefferson paid $224.14 to Car Mart for the balance owed for tax, title and license. However, she never made any monthly installment payments.

Before purchasing the vehicle, Jefferson drove the car from the dealership in Monroe to Columbia, Louisiana, an approximate distance of 60 miles. She observed that the car tended to "shimmy" when it approached highway speeds. Jefferson claimed that the Car Mart salesperson assured her that the car was in excellent condition and that the shimmy resulted from

improper wheel alignment which could be fixed at no additional charge. The salesperson additionally represented that the car had a faulty gas gauge and that Jefferson would have to be vigilant in not letting the car run out of gas. At the time of purchase, the car had an odometer reading of 138,077 miles.

The Bill of Sale from Car Mart contained the following "WAIVER OF WARRANTY":

> Purchaser(s) acknowledge and agrees that the vehicle is being purchased in "as is" condition and accordingly hereby relieves and releases seller and all previous owners thereof from any and all claims for any vices or defects in said vehicle, whether obvious or latent, known or unknown, easily discoverable or hidden, and particularly for any claim or cause of action for redhibition pursuant to the Louisiana Civil Code Articles 2520, et. Se[q]. or for diminution of purchase price pursuant to Louisiana Civil Code 2541, et se[q]. Purchaser(s) acknowledge that he/she understands that Louisiana Redhibition Law allows a purchaser to hold a seller responsible for any hidden defects existing in the vehicle on the date of sale and that he/she is waiving that right.

Jefferson's signature appears following this waiver.

Jefferson claims in this suit that within 10 days of purchasing the vehicle, she began to notice problems with the transmission. Specifically, she noted a heavy leak of transmission fluid. She subsequently took the vehicle back to Car Mart to be repaired around the end of February 2009. Following a cursory inspection by a Car Mart mechanic, Jefferson was referred to Car Mart's regular transmission repairman, Andy Edwards of Edwards Transmission. Jefferson tendered a $150 deposit to Car Mart for the transmission work to be done by Edwards. This deposit, however, was

never conveyed as payment to Edwards Transmission and remained in the custody of Car Mart.[1]

Edwards Transmission's inspection of the vehicle revealed a dirt dauber nest blocking the transmission vent. Edwards unclogged the vent without charge. Nevertheless, according to Jefferson, the transmission problems persisted, and Jefferson took the car back to Edwards for a second inspection a few days later. During this second visit, Edwards found no leaking seals and believed that Jefferson was likely overfilling the car with transmission fluid.

Jefferson continued to experience transmission leaks. On one occasion late at night in a rural area the car stalled out on her. She had to walk to a convenience store to purchase more transmission fluid in order to crank the car back up. In March of 2009, Jefferson parked her car at her father's residence, where it allegedly remained until it was seized for her delinquency on the loan on May 6, 2009. Jefferson stopped driving the car because she believed that the vehicle was undependable and unsafe for transportation. The report of the seizure was stipulated to at trial and evidences that upon seizure the vehicle had 145,672 miles, indicating that Jefferson had driven the car nearly 7,600 miles.

On March 16, 2009, Jefferson filed this suit seeking relief in the form of a rescission of the sale, a refund of the purchase price and recovery of associated costs and attorneys fees. The petition alleged that through its

[1]There appears to be some controversy over whether the $150 constituted only half of the supposed deposit for repairs or the entirety of the amount. Jefferson maintains that Car Mart was to pay an additional $150 and split the cost of repairs, whereas trial testimony reveals that the Car Mart representative never agreed to such an arrangement. In its brief, Car Mart suggests that the $150 was to be applied to the balance owed on the vehicle.

employees, Car Mart represented that the vehicle sold was in good working condition, but that in actuality the vehicle was rendered useless for normal and reasonable use. Additionally, Jefferson sought damages for mental anguish and distress allegedly arising out of unfair trade practices, specifically maintaining that Car Mart illegally retained the $150 deposit supposedly owed to Edwards Transmission. Car Mart answered the suit denying the allegations and asserting that the vehicle was sold "As Is-No Warranty."

At the trial, Jefferson testified that she purchased the vehicle in order to facilitate her employment as a home health aide, which required her to travel extensively. She claimed that she was fired from both her home health job and another job because of her lack of dependable transportation. Jefferson additionally testified that when it came time to signing the paperwork on the car, she felt rushed through the process. Although she admittedly had the opportunity to read the documents, she did not do so. She further testified that Edwards informed her that the transmission was "going out." The testimony of Jefferson's mother, Jackie Jefferson, was offered to corroborate the existence of the problems with the vehicle.

Jeff Ferracci, the part owner of Car Mart, testified on behalf of the company. His testimony reveals that the car in question was subsequently resold to another customer, without any repair to the transmission and that the vehicle's new owner had not reported any problems. Pictures, taken after the car was seized but before the car was resold, were placed into

evidence. No visible signs of transmission leakage are apparent on these photographs.

Andy Edwards also testified for the defense and his testimony was consistent with the above factual recitation of events. He further testified that he neither charged nor received any payment for the services he rendered to Jefferson. He testified that any initial transmission problem would likely have been detected during the lengthy test drive. The defense also introduced into evidence a letter dated March 24, 2009, and signed by Edwards. The letter simply reiterates his findings that he discovered no leak in Jefferson's transmission.

After hearing the testimony and considering the evidence, the trial court awarded $2,393 for rescission of the sale, together with $2,500 in attorneys fees and $1,000 in penalties for deceptive trade practices. The trial court, in its reasons for judgment, found that the vehicle contained defects that existed at the time of the sale that were not observable or visible. The trial court further found that Jefferson did not waive the warranty against redhibitory defects. From this judgment, Car Mart appeals, making two separate assignments of error relating to whether the vehicle possessed a redhibitory defect and whether Jefferson waived her right to sue for redhibitory defects by signing an "as is-no warranty" agreement.[2]

---

[2]In its appellate brief, Car Mart makes the unsupported assertion that retaining the aforementioned $150 deposit did not amount to an unfair trade practice. However, it makes no assignment of error specifically addressing the unfair trade practice awards and further fails to cite any statute or jurisprudential authority in furtherance of this claim. The Courts of Appeal will review only issues which were submitted to the trial court *and* which are contained in specifications or assignments of error, unless the interest of justice clearly requires otherwise. U.R.C.A. Rule 1-3. Because Car Mart did not present briefing or argument on the issue of unfair trade practice, this issue is considered abandoned. U.R.C.A. Rule 2-12.4; *Jones v. Bethard*, 39,575 (La. App. 2d Cir. 4/13/05), 900 So.2d 1081, *writ denied*, 05-1519 (La. 12/16/05), 917 So.2d 1115; *United Services Auto. Ass'n v. Craft*, 37,909 (La. App. 2d Cir. 12/10/03), 862 So.2d

Discussion

I.

Car Mart argues that the vehicle was sold "As Is-No Warranty," defeating plaintiff's claim in redhibition.

The seller must clearly express the extent of his obligations arising from the contract, and any obscurity or ambiguity in that expression must be interpreted against the seller. La. C.C. art. 2474. A sale made "as is" is not a waiver of all warranties. *Ross v. Premier Imports*, 96-2577 (La. App. 1st Cir. 11/7/97), 704 So.2d 17, *writ denied*, 97-3035 (La. 2/13/98), 709 So.2d 750. The vendor is not relieved of the implied warranty under La. C.C. art. 2520 that the thing must be fit for the use which it is intended. The "as is" stipulation, especially in a sale of a used thing, means that the thing is not warranted to be in perfect condition and free of all defects which prior usage and age may cause. *Sanders v. Sanders Tractor Co.*, 480 So.2d 913 (La. App. 2d Cir. 1985).

The parties are free to limit or diminish, by express agreement, the warranty imposed by law. *Id*. La. C.C. art. 2548 provides in relevant part that "[t]he parties may agree to an exclusion or limitation of the warranty against redhibitory defects. The terms of the exclusion or limitation must be clear and unambiguous and must be brought to the attention of the buyer." In order to be effective, a waiver of warranty must: (1) be written in clear and unambiguous terms; (2) be contained in the contract; (3) either be brought to the attention of the buyer or explained to him. *Sabbath v.*

353.

Martin, 44,862 (La. App. 2d Cir. 10/28/09), 2009 WL 3449096. *See also Prince v. Paretti Pontiac Co.*, 281 So.2d 112 (La. 1973); *Ross v. Premier Imports, supra*; and comment (b) to La. C.C. art. 2548. Such waivers are strictly construed against the seller. *Berney v. Rountree Olds-Cadillac Co.*, 33,388 (La. App. 2d Cir. 6/21/00), 763 So.2d 799; *Boos v. Benson Jeep-Eagle, Inc.*, 98-1424 (La. App. 4th Cir. 6/24/98), 717 So.2d 661, *writ denied*, 98-2008 (La. 10/30/98), 728 So.2d 387.

The requirement that a waiver be written in the contract is satisfied, and we will assume that its provisions and statutory references were clear and unambiguous. Nevertheless, following the leading case of *Prince v. Paretti Pontiac*, *supra*, the jurisprudence shows that the written waiver language in the consumer contract alone does not meet the seller's further obligation to bring the waiver to the buyer's attention or explain the waiver to him.

Jefferson's trial testimony reveals that she did not ask any questions or for the opportunity to read the documents she was signing because she considered the interruption of the sales agent to be "rude." She stated that she was rushed through the paperwork and told where to place her signature. On the other hand, the only testimony offered by defendants relevant to the waiver consisted of that by Jeff Ferracci, who maintained no independent recollection of the sale to Jefferson. Instead, Ferracci testified only to the general practices and procedures of Car Mart and how each sale is made pursuant to an "as is" warranty. He admitted that despite the usual procedure of explaining the waiver of warranty to its customers, many

customers are uninterested in having the waiver explained and often sign the documents without reading their content.

Additionally, Car Mart acted in a manner inconsistent with a waiver of warranty. Without any assertion of a compromise, Car Mart agreed to pay half of the deposit, or $150 of the purported $300, that Edwards Transmission supposedly required for the transmission work. These actions by Car Mart suggest that after the sale to Jefferson, it would remedy a defect immediately presented by the vehicle.

Based on the foregoing, we cannot say that the city court was manifestly erroneous in concluding that the waiver of warranty was not properly brought to Jefferson's attention or explained to her.

II.

Car Mart next contends that the car sold to Jefferson did not contain a redhibitory defect warranting a rescission of the sale.

A seller warrants the buyer against redhibitory defects, or vices, in the thing sold. A defect is redhibitory when it renders the thing useless, or its use so inconvenient that it must be presumed the buyer would not have bought the thing if he had known of the defect. The existence of such a defect gives a buyer the right to obtain rescission of the sale. La. C.C. art. 2520; *Sabbath, supra*; *Berney, supra*. The seller owes no warranty for defects in the thing that were known to the buyer at the time of the sale, or for defects that should have been discovered by a reasonably prudent buyer of such things. La. C.C. art. 2521.

The existence of a redhibitory defect is a question of fact which should not be disturbed in the absence of manifest error. *Sabbath, supra*; *Berney, supra*; *Ford Motor Credit v. Laing*, 30,160 (La. App. 2d Cir. 1/21/98), 705 So.2d 1283.

Proof that a redhibitory defect existed at the time of sale can be made by direct or circumstantial evidence giving rise to a reasonable inference that the defect existed at the time of sale. *Berney, supra; Royal v. Cook*, 07-1465 (La. App. 4th Cir. 4/23/08), 984 So.2d 156, *writ denied*, 08-1133 (La. 9/19/08), 992 So. 2d 941; *Boos v. Benson Jeep-Eagle, supra*. The buyer of an automobile who asserts a redhibition claim need not show the particular cause of the defects making the vehicle unfit for the intended purposes, but rather must simply prove the actual existence of such defects. *Young v. Ford Motor Co.*, 595 So.2d 1123 (La. 1992).

In general, the intended purpose of an automobile is transportation. *Stuck v. Long*, 40,034 (La. App. 2d Cir. 8/17/05), 909 So.2d 686, *writ denied*, 05-2367 (La. 3/17/06), 925 So.2d 546; *Guillory v. Morein Motor Co.*, 322 So.2d 375 (La. App. 3d Cir. 1975). Although the warranty created against redhibitory defects regarding used products does not apply as extensively as with new products, it requires that even used equipment operate reasonably well for a reasonable period of time. *Ross v. Premier Imports, supra*; *Berney, supra*. Therefore, obviously the sale of an older car does not carry the same warranty as does the sale of a new one. Inherent in the sale of an older car is the knowledge that the machinery and parts are worn and subject to breakdown and that the vehicle will require mechanical

work from time to time to keep it in good running condition. *Burch v. Durham Pontiac Cadillac, Inc*., 564 So.2d 380 (La. App. 1st Cir. 1990), *writ denied*, 569 So.2d 968 (La. 1990).

A seller who did not know that the thing he sold had a defect is only bound to repair, remedy, or correct the defect. If the seller fails to do so, he is bound to return the price to the buyer with interest from the time it was paid, and to reimburse him for the reasonable expenses occasioned by the sale, as well as those incurred for the preservation of the thing, less the credit to which the seller is entitled if the use made of the thing were of some value to the buyers. La. C.C. art. 2531; *Alexander v. Burroughs Corp*., 359 So.2d 607 (La. 1978); *see also Prince v. Paretti Pontiac*, *supra.* Such a seller is called a "good faith seller." *Stuck v. Long*, *supra*.

In the instant case, the only defect complained of relates to the car's transmission. Jefferson testified that the problem began soon after her purchase and that she had to put a half of a bottle of transmission fluid in the vehicle every other day to make the car run. Additionally, the fact that the car stalled out and left her stranded until she added more transmission fluid evidences that something was wrong with the transmission.

The only testimony produced from anyone with transmission knowledge was that of defense witness, Andy Edwards. His testimony shows that a problem affecting the transmission and its fluid level did initially exist and that the problem was consistent with the fluid problem Jefferson reported before and after his work on the vehicle. Although Edwards believed that the transmission problem was insignificant, he

acknowledged that he never broke down the transmission to examine internally if there could be any problems causing the leakage. Thus, a reading of the record fails to preclude a finding of defects in the vehicle, although perhaps unobservable, at the time Car Mart sold the car to Jefferson.

In its brief, Car Mart makes much of the fact that Jefferson placed nearly 7,600 miles on the vehicle while it was in her custody. We agree that substantial mileage was put on the vehicle in a relatively short period of time. However, the vehicle was purchased to accommodate Jefferson's employment responsibilities as a home health aide, which required extensive traveling. She testified that she was able to continuously add fluid to the vehicle to prevent a total breakdown of the transmission. Moreover, as soon as Jefferson detected the existence of transmission leakage she returned the car to Car Mart for inspection and took appropriate steps thereafter to remedy the problem.

In this case, although an exact identification of the transmission problem was not made, Jefferson proved a pattern of the defect's manifestation in the car which rendered its use at a minimum inconvenient. Therefore, we cannot say that the trial court erred in finding the existence of a redhibitory defect.

Conclusion

For the reasons set forth above, the ruling of the city court is affirmed. Costs of this proceeding are assessed to appellant, La. Car Mart.

AFFIRMED.