

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 25, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP2026

Cir. Ct. No. 2003SC1006

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

DONALD J. PARKER AND LINDA C. PARKER,

PLAINTIFFS-RESPONDENTS,

V.

ROD BUCK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County:
JOHN J. PERLICH, Judge. *Affirmed.*

¶1 DYKMAN, J.¹ Rod Buck appeals from a small claims judgment requiring him to pay \$5,078.42 to Donald J. and Linda C. Parker in damages and

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

costs resulting from Buck's sale of a used car to the Parkers. The trial court concluded that Buck misrepresented the condition of the vehicle to the Parkers by failing to disclose significant defects and telling them that it was in "very good condition." Buck contends the trial court erred because no evidence was presented to support this conclusion. He also contends that the Parkers may not recover because they did not notify him of the defects or give him the opportunity to remedy them. We disagree and affirm.

Background

¶2 In October 2002, the Parkers purchased a 1993 Pontiac Grand Am for their son, Adam, from Buck for \$2,995. A Wisconsin Buyer's Guide posted in the vehicle's window indicated the odometer read 136,112 miles and that it was being offered without a warranty, i.e. "as is." The buyer's guide checklist showed that there were no known problems with the vehicle and all equipment needed to legally operate the vehicle was in proper working condition. Donald Parker testified that Buck told him prior to the sale that the vehicle "was a very good car in very good condition." The Parkers state in their complaint that Buck also told them that the car had never been in an accident.

¶3 On the day the Parkers purchased the vehicle, the radiator went out. They returned the vehicle to Buck, who repaired the radiator. In the months that followed, the Parkers had a number of problems with the car. Don Parker testified that he informed Buck's employee, Bill Lee, of these problems each time they came up but Lee told him "good luck, because [Buck] doesn't really care." The Parkers did not take the vehicle back to Buck for repairs, but spent approximately \$1,800 on repairs and diagnostics at several local repair shops and auto parts stores from October 2002 to April 2003. Some of the problems the Parkers experienced

were: the heater did not work; the transmission leaked; the shocks were bad; and the steering column was held up by a wire. Don Parker testified that his mechanic discovered that the frame had been bent in an accident. Parker also testified the buyer's guide indicated the car had a jack and a spare when, in fact, both were missing.

¶4 Don Parker testified that his son “only got to use the car for about three weeks,” and that it had been “sitting in [the Parkers’] driveway ever since.” Service records for work done at Don’s Towing and Repair and Clason Pontiac show that on October 15, 2002, the car’s odometer read 136,412 miles; on November 6, 2002, it read 137,399; on November 19, 2002, it read 138,035 miles; on November 20, 2002, it read 138,054 miles; on December 3, 2002, it read 138,490; on December 13, 2002, it read 138,854 miles; and on April 25, 2003, it read 143,284 miles. When asked when he last checked the mileage on his car, Don Parker testified that the odometer had not worked since he bought the car.

¶5 In April 2003, the Parkers brought this small claims action against Buck. In April 2004, the court entered a judgment for \$5,000 in favor of the Parkers following a trial. Buck appealed, contending that the trial court denied him the opportunity to present a defense. We agreed and remanded for a new trial, *Parker v. Buck*, No. 04-1547, unpublished slip op. (WI App Feb. 17, 2005). A new trial was held and the court again ruled in favor of the Parkers. Based on the number of problems with the car over a period of a few months, the court found that Buck “knew there was something wrong with this vehicle, maybe lots of things wrong with this vehicle, told the plaintiffs there was nothing wrong with it, flat out lied to them.” The court awarded the Parkers a \$4,653.42 judgment, \$2,900 for the price of the vehicle plus \$1,753.42 in repairs, and \$420.00 in costs. Buck appeals.

Standard of Review

¶6 We will uphold the trial court’s factual findings unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2). “We do not consider the evidence that might have supported contrary findings, but instead search the record for evidence to support the findings the trial court did make.” *City of Stoughton v. Thomasson Lumber Co.*, 2004 WI App 6, ¶28, 269 Wis. 2d 339, 675 N.W.2d 487. “When the circuit court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness’s testimony.” *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345.

Discussion

¶7 Wisconsin’s Deceptive Trade Practices Act (DTPA), WIS. STAT. § 100.18(1), prohibits sellers from making deceptive, false or misleading representations or statements of fact to prospective buyers. It provides, in pertinent part:

No person, firm, corporation or association, or agent or employee thereof ... with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase, sale, hire, use or lease of any ... merchandise ... shall make ... an advertisement, announcement, statement or representation of any kind to the public ... which advertisement, announcement, statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.

Section 100.18(1). The DTPA gives persons who suffer pecuniary loss as a result of a violation of the statute a private cause of action: “Any person suffering pecuniary loss because of a violation of this section by any other person may sue in any court of competent jurisdiction and shall recover such pecuniary loss,

together with costs, including reasonable attorney fees” Section 100.18(11)(b)2.

¶8 Under WIS. ADMIN. CODE § TRANS 139.04(4) (2004), used car dealers must inform prospective buyers of “any significant existing mechanical, electrical and electronic defects and damage and evidence of repair to strut tower, trunk floor pan, frame or structural portion of unibody, including corrective welds.” Section TRANS 139.04(5) requires that used car dealers inform prospective buyers of “whether or not the condition of a vehicle for sale is such that it can be legally operated at all times in accordance with [the statutes and administrative code].” The dealer must disclose such defects that he or she can find using reasonable care, §§ TRANS 139.04(4) and (5), and record this information on a Wisconsin Buyer’s Guide to be displayed within the vehicle, § TRANS 139.04(6).

¶9 The trial court concluded that Buck misrepresented the car’s condition to the Parkers, although it did not address whether it reached this conclusion by applying the test for misrepresentation under the common law,² the DTPA, WIS. ADMIN. CODE § TRANS 139.04 or a combination of these. Buck contends that the trial court erred because no evidence exists in the record to

² There is some question whether a common law misrepresentation claim would be barred by the economic loss doctrine under *Tietsworth v. Harley-Davidson, Inc.* 2004 WI 32, 270 Wis. 2d 146, 677 N.W.2d 233, (economic loss doctrine barred a claim of fraud brought against a motorcycle manufacturer in a consumer transaction), and *Kaloti Enterprises, Inc. v. Kellogg Sales Co.*, 2005 WI 111, 283 Wis. 2d 555, 699 N.W.2d 205, (adopting narrow exception to the economic loss doctrine for claims of fraud in the inducement where the fraud is extraneous to the contract and explaining that misrepresentations concerning the quality of goods sold are not extraneous to the contract). We need not decide this issue, however, because we affirm the trial court’s judgment against Buck on grounds that he failed to exercise reasonable care in completing the Wisconsin Buyer’s Guide, which led him to misrepresent the condition of the vehicle to the Parkers.

support an inference that he misrepresented the condition of the car. We disagree because the trial court's factual findings support the conclusion that Buck failed to exercise reasonable care in inspecting the car, causing him to misrepresent the condition of the vehicle on the Wisconsin Buyer's Guide.

¶10 The trial court found "the plaintiffs' testimony quite credible" and concluded that it "could not say the same thing for the defense." It believed and placed great weight on Donald Parker's testimony regarding the missing jack and spare tire and the wired-up steering column:

[S]ometimes there's little things in the parties' testimony that they probably don't think is that significant, but the Court does because they wouldn't have brought it up if it wasn't the truth. I find the testimony about the jack and the spare tire pretty revealing and the testimony about the steering column pretty revealing, and I accept that testimony.

We conclude that the indication on the Wisconsin Buyer's Guide that the car had a jack and spare when it actually did not supports a reasonable inference that Buck failed to exercise reasonable care in inspecting the vehicle. The failure to indicate on the buyer's guide that the steering column was held in place by wires further supports this inference.

¶11 Because the trial court's factual findings show that Buck did not exercise reasonable care, we further conclude that we cannot know whether Buck would have discovered other defects, including the damaged frame and problems with the transmission, shocks and heater, had he exercised such care. Therefore, we conclude the Parkers are entitled to recover all repair costs awarded by the trial court as well as the purchase price of the vehicle.

¶12 Buck contends the trial court could not have concluded that the car was defective at the time of sale when service records indicate that the car was driven regularly from the date of purchase until April 2003 for a total of nearly 7,000 miles. However, Donald Parker testified that his son drove the car for only three weeks before he stopped using it because of the defective heater. When asked about the odometer readings, Donald Parker testified that the odometer had been broken since he purchased it. While we question how a broken odometer would serially register 7,000 miles, the trial court found that Parker was a credible witness and Buck was not. To the extent that the mileage dispute may have been relevant to the trial court's judgment, we may not disturb the judgment because resolution of the mileage dispute turns upon credibility determinations of the trial court. *See State v. Searcy*, 2006 WI App 8, ¶35, ___ Wis. 2d ___, 709 N.W.2d 497 (citations omitted) (“[W]eight of the testimony and the credibility of the witnesses are matters peculiarly within the province of the trial court acting as the trier of fact.”)

¶13 Finally, Buck contends that the Parkers are not entitled to recover for his alleged failure to report defects on the Wisconsin Buyer's Guide because the Parkers did not provide him with the opportunity to remedy the alleged defects, citing WIS. ADMIN. CODE § TRANS 139.04(6)(a)5. We disagree. Section TRANS 139.04(6)(a)5. provides that

it is an unfair practice for a dealer to not remedy an item improperly reported on the guide that the dealer could have found using reasonable care if the buyer has notified the dealer within a reasonable time after the buyer discovered or should have discovered the improperly reported item and the vehicle is made available to the dealership. The dealer shall reasonably remedy or make a good faith effort to reasonably remedy an item improperly reported within the 30 days of the buyer's notification.

Buck appears to suggest that this section requires that the buyer give the dealer an opportunity to remedy alleged defects that the dealer failed to report. It plainly does not. Rather, it concerns the obligations of the dealer, stating that a dealer engages in an unfair trade practice when the buyer brings an unreported defect to the dealer's attention and the dealer refuses to fix it. Moreover, even if such a requirement existed, Donald Parker testified that when he told Buck's employee, Bill Lee, about his problems with the car, Lee responded, "good luck ... [Buck] doesn't really care."³

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

³ Because we conclude that the trial court's factual findings show that Buck failed to exercise reasonable care in inspecting the car prior to sale, leading him to misrepresent the vehicle's condition on the buyer's guide, we need not address Buck's argument that statements he made about the car to the Parkers were not misrepresentations but non-actionable "puffery."

