

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002391-MR

WORLDWIDE EQUIPMENT, INC.

APPELLANT

v. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 01-CI-00082

PAUL WILBURN

APPELLEE

OPINION
REVERSING AND REMANDING
** **

BEFORE: HUDDLESTON, PAISLEY, AND TACKETT, JUDGES.

TACKETT, JUDGE: Worldwide Equipment, Inc. appeals from a judgment of the Whitley Circuit Court finding it liable for fraudulent misrepresentation as to the existence of a warranty and awarding Paul Wilburn \$6,970.76. After careful review, we reverse and remand.

In October 2000, Wilburn purchased a used 1999 Kenworth tractor from Worldwide which Worldwide had repossessed from the previous buyer. Worldwide specifically disclaimed all warranties

in the sales contract signed by Wilburn. The disclaimer stated as follows:

Seller makes no warranties as to the property, express, implied, or implied by law except, as to new vehicles only, the manufacturer's standard vehicle warranty, which is incorporated herein by reference. Seller specifically disclaims any implied warranty of merchantability or fitness for a particular purpose and any liability for consequential damages for any breach of warranty. All used vehicles are sold "as is."

Nevertheless, there were still manufacturers' warranties on the vehicle which would provide coverage to the tractor's second owner. Denise Trosper, Worldwide's warranty administrator prepared a memo for Wilburn outlining the warranties remaining in effect. These included a five year/750,000 mile warranty on the rear axles which were manufactured by Eaton.

Two months after Wilburn purchased the tractor, the rear differential malfunctioned and the tractor was taken to Worldwide for repair. Employees at Worldwide submitted a claim to Eaton because the rear axles were still under warranty; however, Eaton denied the claim twice stating that the failure was caused by owner misuse and, as such, was excluded from coverage under the manufacturer's warranty. Worldwide offered to repair the tractor at Wilburn's expense and submit the claim to Kenworth which might reimburse Wilburn if the repair should have been covered under the Eaton warranty. At that point, Wilburn elected to have the tractor

towed to another repair shop where he paid for the costs of the repair.

Rather than filing suit against the manufacturer for breach of warranty, Wilburn filed suit against Worldwide alleging that the salesperson had fraudulently misrepresented the existence of a warranty on the rear axles. Worldwide filed a motion for summary judgment which the trial court denied. At trial, Worldwide introduced uncontroverted evidence that there was a manufacturer's warranty on the rear axles and that Worldwide itself had specifically disclaimed any additional warranties on the vehicles it sold. After the trial court denied Worldwide's motion for a directed verdict, the jury received the following instruction:

You will find for the Plaintiff, Paul Wilburn, if you are satisfied from the evidence as follows:

- (a) That before Plaintiff signed the contract Defendant, Worldwide Equipment, Inc., represented to him that the 1999 Kenworth Tractor had a warranty on the Eaton rear differential of five years of (sic) 750,000 miles;
- (b) Defendant, Worldwide Equipment, intended for Plaintiff, Paul Wilburn, to rely on the truth of that statement in deciding whether to buy the tractor;
- (c) That Plaintiff, Paul Wilburn did in fact rely on that representation as being true and otherwise would not have signed the contract under which he purchased the tractor;

- (d) That in fact the tractor did not have a five year, 750,000 mile warranty on the Eaton rear differential at the time that the Plaintiff signed the contract. . .

The jury returned a verdict in favor of Wilburn and awarded him \$6,970.76 in damages. Worldwide filed a motion for a judgment notwithstanding the verdict which the trial court denied. This appeal followed.

Worldwide argues that the trial court erred in denying its motions for summary judgment, a directed verdict, and judgment notwithstanding the verdict. Wilburn counters by asserting that the denial of Worldwide's motion for summary judgment on the pleadings is an interlocutory order which is not subject to appeal. We decide this case on the issue of whether the trial court erred in not granting Worldwide judgment notwithstanding the verdict; therefore, all of Worldwide's other arguments are moot.

Appellate courts must give great weight to the factual findings of the jury and the trial court. "However, where the record shows. . . that only one fair and reasonable conclusion can be drawn from the evidence, then the case should not be submitted to the jury." Crest Coal Co. v. Bailey, Ky., 602 S.W.2d 425, 427 (1980). In the case *sub judice*, the jury heard testimony from two witnesses regarding the manufacturer's warranty on the 1999 Kenworth at the time Wilburn purchased it. Duane McDaniel, Operations Manager for Worldwide, testified that the rear axles

were subject to a five year/750,000 mile warranty from Eaton. In addition, Thomas Clark, a representative for Eaton, testified that the warranty on the rear axles did apply to the tractor when Wilburn purchased it even though it had been previously owned by another buyer. He stated that the warranty covered defects in material or workmanship; however, he rejected Wilburn's warranty claim on the basis that it was due to a non-warrantable failure caused by misuse of the vehicle. Finally, Worldwide introduced the memorandum prepared by its warranty administrator, which Wilburn admitted receiving a copy of, identifying the several manufacturers' warranties on various parts of the tractor. Wilburn introduced no evidence which would negate the existence of the manufacturer's warranty on the Eaton axles.

"It is well settled that the jury is bound to accept and apply the law as contained in the instructions. If it does not, the verdict will be set aside as contrary to law. . ." Daniels v. Central Truckway System, Inc., 253 S.W.2d 1, 1-2 (1952). The trial court instructed the jury that, in order to find in favor of Wilburn on his fraud claim, it had to find that "the tractor did not have a five year, 750,000 mile warranty on the Eaton rear differential . . ." when Wilburn purchased it. Eaton's rejection of the claim as being subject to an exclusion under the warranty does not overcome the fact that Worldwide introduced uncontested evidence that the rear axles were covered by Eaton's warranty when

Wilburn purchased the tractor. Upon careful consideration of the record, it is clear that the trial court erred when it refused to set aside the jury's verdict as being unsupported by the evidence. Consequently, we reverse the judgment of the Whitley Circuit Court and remand this case for entry of an order granting judgment notwithstanding the verdict in favor of Worldwide Equipment, Inc.

ALL CONCUR.

BRIEF FOR APPELLANT:

Emily A. Faith
O'Bryan, Brown & Toner
Louisville, Kentucky

BRIEF FOR APPELLEE:

David O. Smith
Marcia A. Smith
Marcia A. Smith Attorney At
Law
Corbin, Kentucky