

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-000695-MR

CHARLES CANADA  
AND SHARON CANADA

APPELLANTS

v. APPEAL FROM WEBSTER CIRCUIT COURT  
HONORABLE TOMMY W. CHANDLER, JUDGE  
ACTION NO. 97-CI-00150

HUDSON CHEVROLET-OLDS-  
PONTIAC-GMC TRUCK, INC.

APPELLEE

OPINION

VACATING AND REMANDING

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BEFORE: BAKER, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. This is an appeal by the buyers of a used automobile from a judgment entered against them in their action against the car dealership alleging fraud in the purchase of their vehicle based on representations that the car was new. Appellants maintain that the trial court erred in refusing to allow the testimony of a former purchaser of the vehicle from appellee to be admitted. Appellants also maintain that the

trial court erred in refusing to allow a jury instruction to the effect that appellee had a duty to disclose all material facts about the vehicle. Upon review of the record and the applicable law, we agree with both of appellants' claims of error and, thus, vacate the judgment and remand for a new trial.

In July of 1995, appellants, Sharon and Charles Canada, went to appellee car dealership, Hudson Chevrolet-Olds-Pontiac-GMC Truck, Inc. ("Hudson's") to purchase a truck. The Canadas dealt with a sales associate named Ronnie Nance. Sharon testified that they unequivocally informed Nance that they wanted to purchase a new truck with a full manufacturer's warranty. Sharon further testified that when Nance showed them the truck they ultimately purchased, he represented that the truck was new and would have a 12-month/12,000-mile general warranty and a 7-year/70,000-mile extended warranty. The Canadas purchased the truck on July 12, 1995. After getting the truck home, it stayed parked in their garage until September of 1996 because of their daughter's (the intended beneficiary of the truck) grades. When the Canadas drove the truck at that time, they experienced a problem with the truck's heater. Sharon testified that when she called Hudson's and told them about the heater problem, she was informed that the truck's warranty had actually started to run in February of 1994 and that the 12-month warranty had thus expired approximately six

months before the Canadas' purchase. Upon learning this information, Sharon began investigating the history of the truck and learned that the truck was not new, but was actually a used vehicle that had been previously purchased by an individual named Gary Dillingham.

At trial, it was established that the truck was originally shipped from the manufacturer to Expressway Dodge in Evansville, Indiana. While in transit, the truck sustained damage to the driver's side door. As a result of the damage, Expressway Dodge elected to refuse delivery of the truck and it was thus returned to the manufacturer. The manufacturer then performed approximately \$1,000 worth of repairs to the driver's side door and then designated the truck as a "program" vehicle. It was undisputed at trial that when the manufacturer deemed the truck a "program" vehicle, the manufacturer considered the truck to have been placed into service and the manufacturer's warranty began to run at that time. Said designation and commencement of the running of the manufacturer's warranty occurred in or about February 1994. After being designated a "program" vehicle by the manufacturer, the truck was transported to St. Louis, Missouri where it was placed in an auction for dealers and purchased by Hudson's on March 23, 1994. The truck was then transported to Hudson's and put on the lot for sale to the

general public. The truck remained on the lot until May 30, 1995, when it was purchased by Gary Dillingham.

On July 18, 1997, the Canadas brought the action herein against Hudson's claiming: concealment and nondisclosure of the fact that the vehicle was used; that Hudson's committed fraud in the sale of the truck in that it made false representations that the vehicle was new which the Canadas relied on in the buying the vehicle; and breach of express warranty.

At the jury trial on February 27, 2002, Sharon testified that no one from Hudson's ever informed the Canadas that the truck was a "program" vehicle, rather all representations were that the vehicle was new. However, she did admit that Nance told her that there had been prior damage to the truck's side door before the dealership got the vehicle. She further maintained that no representative from Hudson's ever told the Canadas that the truck had been previously purchased by anyone else or that the warranty had begun to run more than a year prior to their purchase of the truck. Finally, Sharon testified that had these facts been known to the Canadas, they would not have purchased the truck.

Charles testified that on the date they bought the truck, Nance told them that the truck had a bent door, a scratch on the door, and a scratch in the bed. According to Charles,

Nance told them that a salesman had used the truck to haul a piece of furniture and that the bed liner had been inadvertently removed or stolen from the truck.

At trial, it was the position of Hudson's that the truck at issue was, in fact, considered a used vehicle and had been so represented by the dealership. It should be noted that Nance died sometime after the sale of the vehicle and was never deposed prior to his death. Greg Hudson, President of Hudson's, testified that no one at Hudson's was aware at the time the truck was sold to the Canadas that the warranty had started to run when the truck was designated a "program" vehicle. Hudson testified that he was first aware of this fact when the Canadas filed suit.

Prior to trial, the Canadas gave notice that they intended to call Greg Dillingham, the former purchaser of the truck, as a witness in their case in chief. Hudson's responded with a motion in limine asking that Dillingham not be allowed to testify pursuant to KRE 404(b), the prior bad acts rule. The trial court ruled in favor of Hudson's, but allowed the Canadas to present Dillingham's testimony by avowal. At trial, the Canadas attempted to present the testimony of Dillingham for the limited purpose of impeaching the testimony of Hudson. The trial court denied the motion. The Canadas then presented the testimony of Dillingham by avowal.

Dillingham testified that he had purchased the truck from Hudson's in May of 1995. He stated that the sales associate had represented the truck as a new vehicle and that it had a "new car" sticker on it. Dillingham testified that he was never advised of any prior damage to the vehicle or that the warranty had begun to run more than a year prior to his purchase. Dillingham stated that shortly after he bought the truck, he was reviewing some of the transaction documents and noticed that the truck was referred to as "used." He then ran the VIN number on the truck and learned that the truck had been put into service more than a year prior to his purchase and that the 12-month manufacturer's warranty had, therefore, expired before he purchased the truck. According to Dillingham, he promptly contacted Hudson's and was reassured by his sales associate that the truck was a new vehicle. The sales associate then referred him to the finance manager, who acknowledged that the truck was a used vehicle. Dillingham stated that he next spoke to Greg Hudson and asked for a full warranty on the truck and a \$1,000 reduction in the purchase price of the truck. Hudson told him that he could provide him with a full warranty, but he could not give him a reduction in the purchase price. Dillingham responded that he did not wish to keep the truck and wanted a refund. Hudson's obliged and gave Dillingham a full

refund. At trial, Greg Hudson denied ever speaking with Dillingham.

At the close of the evidence, both parties tendered instructions. The Canadas' instructions included an instruction stating that Hudson's had a duty to disclose material facts about the truck. The trial court accepted Hudson's version of the instructions and declined to give the instruction sought by the Canadas. The jury ultimately rendered a verdict in Hudson's favor. This appeal by the Canadas followed.

The Canadas' first argument is that the trial court erred in refusing to allow the testimony of Gary Dillingham to be admitted. The trial court based its ruling on KRE 404(b) which provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

(1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or

(2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

In our view, the testimony of Dillingham fell under both exceptions to KRE 404(b). First, the testimony of Dillingham that Hudson's misrepresented that the truck was new

demonstrates that this was the plan on the part of Hudson's to sell the truck. It is significant that the truck involved in the prior bad act is the same truck at issue here. Secondly, given Greg Hudson's testimony that no one at Hudson's knew that the warranty had already run at the time of the Canadas' purchase of the vehicle, Dillingham's testimony would likewise serve to prove the contrary - knowledge on the part of Hudson's that the warranty had, in fact, run. As stated earlier, Dillingham testified that he personally spoke to Hudson over the telephone and asked for a full warranty on the vehicle. We reject Hudson's claim that the warranty issue is a collateral issue because, even though the warranty would have run in this case if the Canadas had gotten a one-year warranty on the date of purchase, the Canadas were nevertheless entitled to a full warranty if they bought the truck new. The issue is not whether the Canadas could have availed themselves of the warranty, but whether they got what they claim they bargained for - a new truck with a full warranty.

Finally, pursuant to KRE 404(b)(2), we believe the evidence regarding the prior sale of the vehicle is inextricably intertwined with the evidence regarding the subsequent sale. As noted above, the same vehicle is involved, as well as the same dealership. In addition, Dillingham's purchase of the truck is

a relevant part of the history of the vehicle which Sharon Canada learned about in investigating the matter.

Accordingly, as we deem the exclusion of the testimony of Dillingham to be reversible error, we vacate the judgment and remand for a new trial consistent with this opinion.

The Canadas' remaining argument is that they were entitled to an instruction stating that Hudson's had a duty to disclose all material facts about the truck according to Smith v. General Motors Corp., Ky. App., 979 S.W.2d 127 (1998). In Smith, this Court was faced with the question of whether summary judgment against the car buyers on a fraud claim was proper where there was evidence that the car dealership had failed to disclose that repairs to the car's radiator and engine had been made prior to the sale. The Court adjudged that summary judgment was improper because the dealership had a legal duty "to disclose material defects and repairs known to it." Smith, 979 S.W.2d at 129.

Hudson's attempts to distinguish the case at bar from Smith by the fact that the Canadas' claim was not based on a failure to disclose defects and repairs made to the car. Rather, it was based on the alleged misrepresentation that the car was new. Indeed, both Charles and Sharon admitted that Nance told them that the side door had been damaged and repaired prior to the sale. However, the Canadas alleged a separate

cause of action from the fraudulent misrepresentation claim based on Hudson's failure to disclose that the truck was a "program" vehicle and that it had been previously purchased by another individual. As noted by the Court in Smith:

To establish an actionable case of fraud based upon suppression of a fact, [the buyer] must demonstrate (1) that [the dealership] had a duty to disclose a material fact, (2) that [the dealership] failed to disclose same, (3) that [the dealership's] failure to disclose the material fact induced him to act, and (4) that he suffered actual damages therefrom. (emphasis added.)

Id. at 129, (citing Faulkner Drilling Company, Inc. v. Gross, Ky. App., 943 S.W.2d 634 (1997), and Wahba v. Don Corlett Motors, Inc., Ky. App., 573 S.W.2d 357 (1978)).

Just as in Smith, Hudson's duty to disclose known material facts about the car arises from the fact that they had superior knowledge about the car which a buyer would reasonably rely on in deciding whether to purchase the car. Also as in Smith, Hudson's would be subject to the mandates of KRS 190.071(1)(e) which prohibits "false or fraudulent representation in connection with the operation of the new motor vehicle dealership." We note that the definition of "fraud" in KRS 190.010(24) includes "an intentional failure to disclose material fact," which does not limit the disclosure to previous damage and repair to the car. In our view, the fact that the

truck had been previously put into service as a "program" vehicle and had been sold to another individual are material facts which a buyer would reasonably rely on in deciding whether to purchase that vehicle. Hence, we believe the trial court erred in refusing to instruct the jury on Hudson's duty to disclose those facts.

For the reasons stated above, the judgment of the Webster Circuit Court is vacated and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

B. Todd Wetzel  
Princeton, Kentucky

BRIEF FOR APPELLEE:

H. Randall Redding  
Henderson, Kentucky