RENDERED: February 18, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002200-MR

PAUL WILBURN — APPELLANT

v.

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

WORLDWIDE EQUIPMENT, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KNOPF AND TACKETT, JUDGES; EMBERTON, SENIOR JUDGE.[1]

EMBERTON, SENIOR JUDGE: This is an appeal from the denial of appellant's CR[2] 60.02 motion alleging that perjured testimony had been introduced in the trial of his action for damages stemming from appellee Worldwide Equipment's misrepresentation as to the existence of a warranty covering the axle on a vehicle he purchased from appellee. We affirm.

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[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] Kentucky Rules of Civil Procedure.

The action precipitating this appeal was originally instituted upon appellant's claim that Worldwide had fraudulently misrepresented the existence of a warranty on a used 1999 Kenworth tractor he purchased in October 2000. After a jury awarded appellant the sum of $6,970.76 on his claim, Worldwide filed a motion for a judgment notwithstanding the verdict denied by the trial court. Worldwide's subsequent appeal to this court resulted in a June 3, 2003, opinion reversing the denial of that motion and remanding the case for entry of an order "granting judgment notwithstanding the verdict in favor of Worldwide Equipment, Inc." The JNOV mandated by this court's opinion was not immediately entered and on July 24, 2003, almost two years after the entry of the judgment, appellant filed a motion for a new trial based upon allegedly perjured testimony as to whether Eaton Corporation, the manufacturer of the axle in question, did in fact provide a warranty on appellant's vehicle. After a hearing, the trial court granted appellant's motion and set the matter for trial.

However, Worldwide subsequently moved for entry of a JNOV in accordance with this court's opinion. The trial court granted the motion, dismissed appellant's claim with prejudice and removed the case from the court's docket. Appellant then lodged the instant appeal, advancing the single issue of whether the trial court erred in denying his CR 60.02 motion, which had

been based solely upon an allegation of perjured testimony. In response to the arguments set out in appellant's brief, Worldwide argues that not only was the CR 60.02 motion untimely as having been filed well outside the one-year limit specifically provided in the rule itself, but also that the perjury claim was unfounded and was insufficient to adversely affect the disputed issue at trial: whether Worldwide had falsely misrepresented the existence of a warranty on the vehicle it sold to appellant. We agree.

The allegedly perjured testimony concerned the representation that Eaton Corporation provided a 5 year/250,000 mile warranty on the axles on appellant's truck at the time he purchased it. The "newfound evidence" upon which this allegation was based is contained in a letter from Eaton's counsel concerning separate litigation appellant filed against Eaton. However, the following letter more fully explained the information in the letter upon which appellant relies:

> As you know, you provided Eaton Corporation with an open extension to file responsive pleadings pending our investigation into the subject claim. On or about July 21, 2003, we advised you that the subject axle was built on February 8, 1999 and that, pursuant to an agreement between Dana Corporation and Eaton Corporation, Dana Corporation has responsibility for the subject axle. <u>This statement should not be construed as suggesting that there was no warranty on the subject axle, but rather, that Dana Corporation is responsible for warranties on</u>

> all axles built after January 1, 1998. Either way, the warranty claim would be submitted to Real Time Warranty and the operative difference is which entity is responsible for payment on the claim. Therefore, Eaton is an incorrect party to this action and we previously provided you with the information concerning Dana Corporation. That being the case, it is requested that you forward a conformed copy of the dismissal at your earliest convenience. (Emphasis added.)

First, as to whether this information can be properly categorized as "newly discovered," we agree with Worldwide that a proper investigation into the party responsible for payment on the warranty would have disclosed the responsible party years ago. However, even if the motion had been timely, it would not provide the relief appellant sought.

In this court's previous opinion, it was specifically noted that Eaton's rejection of appellant's 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." Thus, it is almost indisputable that regardless of whether Eaton Corporation or Dana Corporation provided the warranty coverage, the fact remains that, as decided in the very clear holding of our previous opinion, warranty coverage was provided and Worldwide was entitled to a JNOV on appellant's misrepresentation claims.

Nothing in this "newly discovered" evidence in any way demonstrates that Worldwide had any knowledge Dana Corporation was actually the entity responsible for warranty claims on the axle. More important, however, it in no way negates Worldwide's evidence concerning the existence of a warranty covering the axle in question.

The denial of appellant's CR 60.02 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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