

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000630-MR

MICHAEL S. NICHOLS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 03-CI-005970

NEIL HUFFMAN NISSAN, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TACKETT¹ AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.²

TACKETT, JUDGE: Michael Nichols (Nichols) appeals from a judgment of the Jefferson Circuit Court granting summary judgment in favor of Neil Huffman Nissan, Inc. (Huffman) on his claims for breach of contract, fraud and conversion, excluding the testimony of certain witnesses at the trial on his remaining

¹ This opinion was completed and concurred in prior to Judge Julia K. Tackett's retirement effective June 1, 2006. Release of the opinion was delayed by administrative handling.

² 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.

claim of violating Kentucky's Consumer Protection Act (CPA), and granting a directed verdict in favor of Huffman on that claim at trial. We affirm the decision of the trial court.

Nichols was involved in an accident in August 2002 when another driver rear-ended his 1997 Nissan truck with her car. His bumper, tailgate and transmission were damaged as a result. After he had problems communicating with the driver who was at fault, Nichols contacted his insurer, State Farm Insurance Company (State Farm), to arrange for repairs. Nichols carried collision coverage on his truck with a \$250.00 deductible. He initially took the truck to Cottman Transmission; however, after three visits, he was still having problems shifting gears. Nichols then contacted Daniel Bowling (Bowling), an adjuster with State Farm, who advised Nichols that Huffman was on their list of approved repair facilities.

Nichols took his truck to Huffman in February 2003. The repair shop performed an initial estimate indicating that the total charge for the work to be done would be \$547.00 and that the entire amount would be paid by State Farm. The body shop did not in fact know what the status of Nichols' insurance deductible was. When he brought the car in, he was advised that the actual repairs might cost more since it might be necessary to replace the tailgate. Huffman advised Nichols that he would be contacted and asked to consent before any additional work was

performed. Because parts had to be ordered, Nichols kept the truck until such time as Huffman had the parts and was ready to repair it. After the parts arrived, Huffman contacted Nichols and scheduled March 5, 2003, as the repair date. Additional work, not contained in the initial estimate was needed, and Nichols gave his permission for the work to be prepared. The total bill was \$1,301.81.

When Nichols came to pick up the truck, Huffman advised him that he owed \$250.00, the amount of the deductible under his collision policy. Nichols became angry and accused Huffman of trying to take advantage of him. He stated that he had already paid that amount for the work previously done on his transmission at another shop, and refused to pay anything. Huffman's computer which was linked to State Farm did not show that the deductible had been previously paid or waived, so they contacted the insurer by telephone. State Farm advised Huffman that Bowling has already left for the day, so Huffman called the regional office in Tennessee. Once again, State Farm informed Huffman that Bowling was the only person who could clear up the discrepancy. Huffman offered to take a check or credit card information from Nichols, but hold off on processing the information until the insurance situation was resolved. Nichols refused and called the police. After speaking with the people who were involved, officers advised Nichols that his dispute

with Huffman was a civil matter, rather than a criminal matter. Nichols left and went to the county courthouse where he filed a mediation complaint against Doug Wolford (Wolford), Huffman's General Manager, who had not been involved in the dispute.

The next morning when Bowling arrived at work, he discovered the message from Huffman. Because of some uncertainty about the relationship between the collision and the transmission repairs, Bowling had not yet made a decision whether to credit those repair bills against Nichols' deductible. Bowling entered a credit of \$245.19 against Nichols' deductible, leaving only \$4.81 owing, then contacted Huffman to advise the repair shop that he had updated the computer records. Huffman called Nichols and left a message advising him that he now owed only \$4.00 and could pick his truck up upon payment of that amount. Nevertheless, Nichols waited an additional five days before picking up the truck.

After the mediation complaint was dismissed, Nichols filed a *pro se* small claims action seeking \$148.00 in damages. He subsequently retained counsel who amended his claim to add actions for breach of contract, conversion, fraud, and violation of the CPA. The trial court granted Huffman's motion for summary judgment, on the claims for breach of contract, conversion, and misrepresentation. In support of his claim that Huffman violated the CPA, Nichols sought to introduce testimony

from a former employee and evidence of additional consumer complaints against Huffman. The trial court excluded this evidence and, after Nichols presented his evidence, granted a directed verdict for Huffman on the remaining claim. This appeal followed.

Nichols first argues that the trial court erred in granting summary judgment for Huffman on his claims for breach of contract, fraud and conversion. Kentucky Civil Procedure Rule (CR) 56.03 allows summary judgment only where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." The Kentucky Supreme Court has previously held that a party is entitled to summary judgment "when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991). Nichols contends that the preliminary estimate prepared by Huffman represented a contract between himself and the dealership and, under the terms of that contract, he would owe nothing for the repairs to his truck. Thus, he claims Huffman breached the contract by refusing to release his vehicle without payment of the \$250.00 deductible which was subsequently reduced to \$4.81 after State Farm credited his transmission repairs against the deductible. Huffman argues that the preliminary

estimate was not a formal contract containing all of the obligations of the parties as evidenced by the fact that additional repairs, not contained in the estimate, were performed which caused the bill to increase from \$547.50 to \$1,301.81. Further, Huffman points out that it had no control over the amount State Farm would agree to pay under Nichols' insurance policy. The trial court agreed with Huffman's contention that it was obligated to repair Nichols' truck and he was obligated to pay any amount not covered under his insurance policy. We disagree with Nichols' contention that the estimate was a contract between the parties. Thus, the trial court correctly determined that Huffman was entitled to summary judgment on the issue of breach of contract.

With regard to Nichols' conversion claim, the trial court reasoned as follows:

Nichols alleges that Huffman committed conversion on March 5, 2003, when it refused to turn over his truck without the payment of the \$250.00 deductible. Conversion is the wrongful exercise of dominion and control over the property of another. State Automobile Mutual Insurance Company v. Chrysler Credit Corporation, Ky. App., 792 S.W.2d 626 (1990).

[Kentucky Revised Statute] 376.270 reads, in relevant part, as follows:

Any person engaged in the business of selling, repairing or furnishing accessories or supplies for motor vehicles shall have a lien on the motor vehicle for the reasonable or agreed charges for repairs, work done or

accessories or supplies furnished for the vehicle . . . and may detain any motor vehicle in his possession on which work has been done by him until the reasonable or agreed charge therefor has been paid.

At the time Nichols arrived to pick up his vehicle, Huffman had no assurance from State Farm that it would pay the \$250.00 deductible and Nichols refused to pay it. Consequently, Huffman's subsequent retention of Nichols' truck based upon a lien acquired under KRS 376.270 was not a wrongful detention, which is required for conversion.

Nichols argues that the language in the statute "or agreed charges" required Huffman to release the vehicle to him without payment. As we have already agreed with the trial court's determination that the preliminary estimate was not a contract between Nichols and Huffman, we are not persuaded that a binding agreement for him to pay nothing existed. Further, we would point out that Huffman, in an effort to resolve the problem that same evening, offered to take either credit card information or a check which would not be negotiated unless State Farm refused to pay the full amount of the repair.

Nichols also argues that Huffman fraudulently induced him to bring his truck to its service center by misrepresenting that his insurance would pay the entire amount of the repairs.

The general rule is that an action for fraud . . . cannot be maintained unless the "six elements" of fraud are shown, being: (a) a material representation, (b) which is false, (c) known to be false or made recklessly, (d) made with inducement to be acted upon,

(e) acted in reliance thereon, and (f) causing injury.

Wahba v. Don Corlett Motors, Inc., 573 S.W.2d 357, 359 (Ky. App. 1978). The trial court found that Nichols failed to prove a material misrepresentation had occurred since Huffman's initial estimate indicated that he would owe nothing for the repair work and, in fact, he was ultimately required to pay only \$4.81 to satisfy his deductible. We agree with the trial court's assessment of this element of Nichols' claim. Since there were no genuine issues of material fact regarding Nichols' claims for breach of contract, conversion and fraud, the trial court correctly granted summary judgment in favor of Huffman.

The trial court allowed Nichols' claim that Huffman had violated the CPA to proceed to trial; however, in response to Huffman's motion *in limine*, certain evidence was excluded. Nichols sought to introduce testimony from Jerry Shields (Shields), a former service manager at Huffman. Shields, who left Huffman to work for another dealership after Wolford became the general manager gave extensive deposition testimony purporting to show Wolford's dishonesty. Nichols argued that Shields' testimony was admissible under Kentucky Rule of Evidence (KRE) 404(b) which reads, in relevant part, as follows:

(b) Other crimes, wrongs, or acts. 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

He purported to believe that Huffman, by demanding that he pay his \$250.00 deductible, was engaging in a practice called double dipping. Nichols maintained that Huffman's intent was to obtain the \$250.00 from him and then bill State Farm for the entire amount, thus collecting an extra \$250.00. He contends that Shields' testimony about Wolford's dishonesty would serve as proof that that Huffman was not mistaken in trying to collect money from Nichols and, thus, was admissible under KRE 404(b)(1). The trial court found that Shields' deposition consisted largely of inadmissible hearsay testimony. We agree with the trial court's conclusion and further point out that Nichols never spoke with Wolford and failed to introduce any connection between Wolford's alleged dishonesty and Nichols' payment dispute with the repair shop.

Huffman also successfully sought exclusion of evidence relating to other consumer complaints about its repair shop. Nichols had obtained information regarding other customers' complaints to the Office of the Attorney General. However, none of these complaints involved double dipping. Since these complaints were factually dissimilar, they were properly excluded as irrelevant under KRE 402.

Nichols finally appeals from the trial court's decision granting a directed verdict in favor of Huffman on the issue of violating the Consumer Protection Act. KRS 367.170 and KRS 367.220. In order to enter a directed verdict, a trial judge must determine that "there is a complete absence of proof on a material issue or . . . no disputed issues of fact exist upon which reasonable minds could differ." Bierman v. Klapheke, 967 S.W.2d 16, 18 (Ky. 1998). In addition to his own testimony, Nichols presented the testimony of Bowling, who was the claims adjuster handling his insurance claim. Bowling testified that he had delayed crediting the transmission repairs against Nichols' deductible because of uncertainty over whether they were related to the accident. He further stated that Huffman's employees had no way of knowing that State Farm would pay the entire repair bill as long as the information in State Farm's computer reflected that the deductible had not been satisfied or waived. According to Bowling, there was nothing dishonest about Huffman's conduct. Bowling stated that, based on the information available to its employees at the time, Huffman should not have released the truck to Nichols without payment of the \$250.00 deductible. Our Kentucky Supreme Court has previously stated

The [Consumer Protection Act] requires some evidence of "unfair, false, misleading or deceptive acts" and does not apply to simple

incompetent performance of contractual duties unless some element of intentional or grossly negligent conduct is also present.

Capitol Cadillac Olds, Inc. v. Roberts, 813 S.W.2d 287, 291 (Ky. 1991). Nichols was unable to produce evidence at trial, beyond his own unsupported speculations, that Huffman acted intentionally to deprive him in any way, nor that its behavior was grossly negligent. Hence, the trial court acted correctly in granting a directed verdict in favor of Huffman on Nichols' claim that Huffman violated the CPA.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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