IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

CHARLENE BROWN, et al.,	**CASE NO.: 01 CV 4716**
Plaintiff,	**JUDGE MARY KATHERINE HUFFMAN**
-vs-	
P.A. DAYS, INC., et al.,	
Defendant.	**DECISION, ORDER AND ENTRY SUSTAINING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

This matter is before the court on the Plaintiff's, Charlene Brown, et al., Motion for Partial Summary Judgment filed on January 17, 2002. The Defendant's, P.A. Days and Central Ohio Credit Corporation, Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment was filed on January 25, 2002. The matter is now ripe for review.

FACTS

The instant complaint was filed as a class action involving consumers who purchased used motor vehicles from Defendant P.A. Days ("Pay Days"), which operates dealerships in several locations, including Kettering, Dayton, and Moraine. The vehicles purchased at Pay

Days are often financed by Defendant Central Ohio Credit Corporation ("COCC"). Each of the Plaintiffs purchased vehicles from Defendants using the same forms with the same language.

The Plaintiff asserts that the violation of the law is in the Defendants' forms. More specifically, the Plaintiff submits the Retail Buyers Order (Motion for Partial Summary Judgment Ex. 1), Retail Installment Contract and Security Agreement (Motion for Partial Summary Judgment Ex. 2), and Limited Warranty (Motion for Partial Summary Judgment Ex. 3). In relevant part to the pending Motion for Partial Summary Judgment, Plaintiffs allege that the Defendants violated the Magnuson-Moss Warranty Act ("MMWA"), 15 U.S.C. §2301 et. seq., and the Federal Trade Commission's ("FTC")Used Car Rule, 16 C.F.R. 455.1 et. seq., thus by extension the Ohio Consumer Sales Practices Act.

The Defendants argue that the forms do not contain a violation of law amendable to summary judgment at this time.

LAW AND ANALYSIS

Summary Judgment Standard

Summary judgment is appropriate pursuant to Rule 56(C) of the Ohio Rules of Civil Procedure when (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) construing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to only one conclusion, that being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St 2d 64, 66 (1978). The burden of showing that no genuine issue exists as to any material fact falls

upon the moving party. *Mitseff v. Wheeler*, 38 Ohio St. 3d 112, 115, 526 N.E.2d 798 (1988). Additionally, a motion for summary judgment forces the nonmoving party to produce evidence on any issue (1) for which that party bears the burden of production at trial, and (2) for which the moving party has met its initial burden. *See Dresher v. Burt*, 75 Ohio 3d 280, 662 N.E.2d 264 (1996).

Claim Three: Magnuson-Moss Warranty Act

In reviewing the Plaintiff's Motion for Partial Summary Judgment the courts finds the following language, 15 U.S.C.S. §2302, 15 U.S.C.S. §2308, and 16 C.F.R. 700.10(a), to be pertinent to the instant action.

> 15 U.S.C.S. §2302. Rules Governing Contents of Warranties
>
> (c) Prohibition on conditions for written or implied warranty. No warrantor of a consumer product may condition his written or implied warranty of such product on the consumer's using, in connection with such product, *any article or service (other than article or service provided without charge under the terms of the warranty) which is identified by brand, trade, or corporate name.*

> 16 C.F.R. 700.10
>
> Section 102(c) prohibits arrangements that condition warrant coverage on the use of an article or service identified by brand, trade, or corporate name unless that article or service is provided without charge to the consumer.

The above language prohibits tying arrangements in connection with warranties. These types of warranties "harm consumers because they provide little value and the consumer has little control over the prices charged for the repair. Fed. Trade Comm, Final Action Concerning Review of Interpretations of Magnuson-Moss Warranty Act, 64 Fed. Reg.

19700 (April 22, 1999).

In the Purchaser Obligation clause of the Limited Warranty it is expressly stated that the Plaintiffs must use Pay Day's Used Car's service department for warranty repairs. (Pl. Motion for Partial Summary Judgment Ex. 3). The payment of repair is to be split "50/50" between the purchaser and the dealership. Thus, the warranty service is not without charge as the purchaser must pay half of the cost. The court finds that as a matter of law, the Purchaser Obligation of the Limited Warranty violates 15 U.S.C.S. §2302(c).

It has been held that a violation of MMWA is itself a violation of the Federal Trade Commission Act, 15 U.S.C.S. §45 (a)(1). *Brown v. Spears* (August 20, 1979), Franklin Mun. Ct. Case No. 8897, unreported

Claim Four: FTC Used Car Window Sticker Rule

The pertinent language of the FTC Used Car Window Sticker Rule is located at 16 C.F.R. §455.3(b), as follows:

> Incorporated into contract. The information on the final version of the window form is incorporated into the contract of sale for each used vehicle you sell to a consumer. Information on the window form overrides any contrary provisions in the contract of sale. To inform the consumer of these facts, include the following language *conspicuously* in each consumer contract of sale:
> The information you see on the window form for this vehicle is part of this contract. Information on the window form overrides any contrary provisions in the contract of sale.

This court acknowledges that Defendant Pay Days did include the required language in the Retail Buyers Order. However, the rule requires that the language must be conspicuous.

This court finds *Lawhorn v. Joseph Toyota, Inc.* (2001), 141 Ohio App.3d 153, to be

highly persuasive. In the *Lawhorn* case, the Second District Court of Appeals held that language located in the fine print "boilerplate" portion of the dealerships's contract can by no stretch of the imagination be considered conspicuous. The *Lawhorn* court found no legislative intent to permit a dealer to comply with the rule by simply stating the required language in the contract.

After reviewing the form, the court finds that a reasonable and average consumer would not view the required language as conspicuous. The required language is in fine print intermingled with other contract language. It is interesting to note that the disclaimer language of the contract is in all capital letters, while the required language of C.F.R. §455.3(b) is in fine print. As such, the court concludes that merely supplying a standard FTC window form language cannot relieve a dealership of ensuring that the language is conspicuous.

It has been held that a violation of the FTC Used Car Window Sticker Rule is a per se violation of the Ohio Consumer Sales Practices Act. *Cummins v. Dave Fillmore Car Co., Inc.* (10th Dist. C.A., October 27, 1987), Case No. 87-AP-71, unreported.

CONCLUSION

Accordingly, when viewing the law and the evidence in favor of the non-moving party, reasonable minds could come to only one conclusion as to whether the Defendant violated the MMWA and the FTC Used Car Window Sticker Rule. Plaintiff's Motion for Partial Summary Judgment is SUSTAINED.

SO ORDERED:

Mary K. Huffman
HONORABLE MARY KATHERINE HUFFMAN

Copies of the above were sent to all parties listed below by ordinary mail on this date of filing.

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