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FILED

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

JAMES HACHET,

Plaintiff,

v.

SMEDLEY'S CHEVROLET SALES, INC., et. al,

Defendants.

CASE NO. 2001 CV 3803

SCANNED

JUDGE MARY KATHERINE HUFFMAN

DECISION, ORDER, AND ENTRY

This matter is before the Court on the Stipulations of the parties. The parties advised the Court that the Court's determination of whether Defendant violated 15 U.S.C. 2308 or 15 U.S.C. 2302, by providing written representations of conflicting warranty rights, and whether doing so is a violation of the Magnuson Moss Warranty Act and/or the Ohio Consume Sales Practices Act and whether, in the transaction, Defendant violated 15 U.S.C. 2302(c) would be dispositive of this case. The parties stipulated as follows:

1. Plaintiff is a consumer, defendant is a supplier and merchant, and the parties did engage in a consumer transaction;
2. Exhibit A (2 pages) is a true and accurate copy of the sales contract between the parties for the vehicle involved in this case;
3. Exhibit B is a true and accurate copy of the written "used vehicle limited warranty" between the parties for the vehicle involved in this case;
4. The parties agree that if the court concludes that defendant violated either 15 U.S.C.

2308 or 15 U.S.C. 2302, any such violation would be an unfair or deceptive act prohibited by the Consumer Sales Practices Act and that Plaintiff would be entitled to rescission, and that if the Court so finds, then Plaintiff would agree to dismiss his Motor Vehicle Repair Rule claim and any remedy under any other claim would be duplicative and all remaining claims would be moot.

This matter is now ripe for decision.

## I. FACTS

On January 10, 2001, Plaintiff, James Hachet, purchased from Defendant, Smedley's Chevrolet, a 1997 Chevrolet S10 extended cab truck. Hachet entered into a contract for the purchase of that vehicle which contained certain boilerplate language regarding warranties under the contract. Hachet also received a Used Vehicle Limited Warranty as a result of the transaction. The Buyers Guide on the vehicle also contained information about the limited warranty available to Plaintiff.

## II. LAW AND ANALYSIS

The question before the Court is whether, based upon the stipulated facts, the Defendant violated the Magnuson-Moss Warranty Act and whether it violated the Ohio Consumer Sales Practices Act in transactions it entered into with the Plaintiff, James Hachet.

The Magnuson-Moss Warranty Act creates federal standards for warranties provided to buyers of consumer goods. The act also provides specific remedies to purchasers where sellers of consumer goods fail to comply with the federal warranty standards. *See Bush v. American Motors Sales Corp.*, 575 F. Supp. 1581 (1984).

The Magnuson-Moss Warranty Act, codified at 15 USC Section 2301, et seq. provides at Section 2301, in pertinent part:

(6) The term "written warranty" means -

(A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or

(B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking, which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

Section 2302 provides, in pertinent part:

> In order to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products, any warrantor warranting a consumer product to a consumer by means of a written warranty shall, to the extent required by the rules of the Commission, fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty......

Section 2304 sets forth the federal minimum standards for warranties:

In order for a warrantor warranting a consumer product by means of a written warranty to meet the Federal minimum standards for warranty -

(1) such warrantor must as a minimum remedy such consumer product within a reasonable time and without charge, in the case of a defect, malfunction, or failure to conform with such written warranty;

(2) notwithstanding section 2308(b) of this title, such warrantor may not impose any limitation on the duration of any implied warranty on the product;

The Magnuson-Moss Warranty Act also provides, at Section 2308:

(a) Restrictions on disclaimers or modifications. No supplier may disclaim or modify (except as provided in subsection (b)) any implied warranty to a consumer with respect to such consumer product, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.

(b) Limitation on duration. For purposes of this title [15 USC Sections 2301 et seq.] (other than section 104 (a)(2)) [15 USC Section 2304(a)(2)] implied warranties may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty.

(c) Effectiveness of disclaimers, modifications, or limitations. A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this title [15 USC Section 2304(a)] and State law.

As the aforementioned recitations of the various provisions of the act reveal, the Magnuson-Moss Warranty Act provides that where a written warranty or service contract is given to the purchaser, implied warranties may not be disclaimed or modified. *15 U.S.C. Section 2308.* However, where an express limited warranty is given, implied warranties may be limited to the duration of the written warranty if the same is of reasonable duration. *15 U.S.C. Section 2308(b).* In order for limitations to comply with the Magnuson-Moss Warranty Act, however, the limitations on the duration of implied warranties must be prominently displayed on the face of the warranty in clear and unmistakable language if the limitations are not unconscionable. *15 U.S.C. Section 2308(b).*

The matter before the court is similar to the issues addressed by the Second District Court of Appeals in *Lawhorn v. Joseph Toyota, Inc.* (2001), 141 Ohio App. 3d 153. In *Lawhorn* the court was called upon to determine whether the language of the FTC window form was sufficient to overcome the disclaimer contained in the sales contract. As the *Lawhorn* court stated, "we must

decide whether, upon reading the contract in conjunction with the FTC window form, a 'reasonable, average consumer' would be misled as to the 'nature or scope of the warranty' provided by Joseph Toyota." *Id.* at 158. The *Lawhorn* court found that the sales contract at issue in that matter expressly stated the terms of the limited warranty provided to Lawhorn. The contract also expressly disclaimed all other warranties, including the implied warranties of merchantability and fitness for a particular purpose. The court found that, on its face, the sales contract violated the Magnuson-Moss Warranty Act. The court went on to then consider the effect that the FTC window form had on the sales contract. The FTC window sticker purported to override any contrary provisions contained in the sales contract. The *Lawhorn* court found that the general language of the FTC window sticker indicating that state law may provide more rights is insufficient to override the specific disclaimer set forth in the sales contract. The *Lawhorn* court stated:

> The contract specifically disclaims the implied warranties of merchantability and fitness for a particular purpose, while the FTC form merely refers to unnamed 'implied warranties' arising under state law. There is nothing contained within these documents that would inform an average, reasonable consumer that the FTC form trumps the contract's clear, express disclaimer of the implied warranties, because there is no clear indication that these provisions conflict. Furthermore, we conclude that the mere act of supplying a standard FTC window form cannot relieve a dealer of its duty to comply with the terms of the MMWA. There is no indication that either Congress or the FTC intended to permit a dealer to clearly violate the MMWA with specific language in one contract document while hiding behind the claimed curative effect of a general, vague statement in another form document to the effect that the consumer 'may' have additional remedies under state law.
>
> As previously noted, Joseph Toyota is correct in its assertion that, pursuant to Section 455.3(b), Title 16, C.F.R., the terms of the FTC window form are incorporated into the sales contract, and the information on the form override any contrary provisions in the contract. However, the same rule requires that this fact must be conspicuously displayed on the contract of sale. In this case, the required language is merely included in the fine print 'boilerplate' portion of the contract. By no stretch of the imagination can it be considered conspicuous.

> Furthermore, although Section 455.4, Title 16, C.F.R. provides that dealers cannot make any statements, oral or written, that alter or contradict this disclosure, Joseph Toyota's sales contract provides that its sales contract (and any accompanying loan disclosure form) 'shall constitute the entire agreement' Between the dealer and the purchaser. This statement contradicts the disclosure form required by Section 455.3(b), cited above.

*Id.* at 159.

The court finds that the authority detailed in *Lawhorn* is applicable herein. The sales contract and the FTC window sticker detailed in *Lawhorn* are very similar to those at issue herein. The court further finds that the contract entered into by the parties disclaimed all warranties, including the implied warranties of merchantability and fitness for a particular purpose arising by operation of Ohio law. The sales contract, on its face, violates the Magnuson-Moss Warranty Act. While the FTC window sticker purports to be part of any sales contract, the court finds that the general language of the FTC window sticker indicating that state law may provide more rights is insufficient to override the specific disclaimer set forth in the sales contract, and is patently inconsistent with the sales contract. Further, the contract specifically disclaims the implied warranties of merchantability and fitness for a particular purpose, while the FTC window sticker refers to unspecified "implied warranties" arising under Ohio law. The court further finds that there is nothing in the aforementioned documents that would inform an average, reasonable consumer of the inconsistencies between the FTC window sticker and the contract's clear and expressed disclaimer of the implied warranties. The court further notes that the language that is required to be conspicuous is actually in a smaller print than many of the other provisions of the sales contract, nor is it in bold print, as are other provisions of the contract. Further, the provisions of the FTC window form that are required to be set forth in clear and unmistakable language and prominently displayed on the face of the warranty are set forth in a type that is not different than

the other provisions of the form. In addition, other provisions of the FTC window form are in bold and in all capital letters. The warranty provisions do not comply with the requirements set forth in the MMWA that said provisions be prominently displayed. The applicable provisions are no more noticeable than any other provision of the FTC form.

The court further finds that the required language is included in the fine print of the contract. It is not conspicuous as is required by the MMWA. The court finds that Defendant violated the Magnuson-Moss Warranty Act as specifically contained in 15 U.S.C. 2308 and 15 U.S.C. 2302 in its dealings with the Plaintiff, James Hachet. Therefore, the issue next to be addressed is the remedy available to Plaintiff.

The Ohio Consumer sales Practices Act focuses on the practices used by the supplier and not on the completed sale. Where the violation of the Ohio Consumer Sales Practices act was one prohibited by O.R.C. Section 1345.02 or 1345.03, the consumer may elect to rescind the transaction, pursuant to O.R.C. Section 1345.09 (A). The parties have stipulated that a violation of U.S.C. Section 2308 is a violation of Ohio's Consumer Sales Practices Act, entitling Plaintiff to rescission of the contract.

As an additional note the court finds that Defendant failed to list the contact person for complaints on the Used Car Guide presented to Plaintiff, as required by 16CFR455. Such failure constitutes a violation of the Consumer Sales Practices Act pursuant to *Rubin v. Gallery Auto Sales*, 1997 WL 1068459, Case No. 303854 (Common Pleas, Cuyahoga Co., 6-9-97)

The court further finds that remaining before this court is the matter of Plaintiff's attorney fees, to which Plaintiff is entitled as a result of Defendant 's violation of the Ohio Consumer Sales Practices Act. The matter of Plaintiff's attorney fees herein shall be heard by this Court on the **18th day of September, 2002 at 3:30pm**.

IT IS SO ORDERED

JUDGE MARY KATHERINE HUFFMAN

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

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