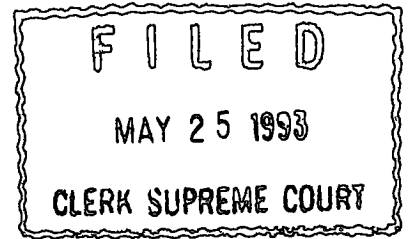


IN THE COURT OF APPEALS OF IOWA

No. 3-120 / 92-579



MARY LEE HOFFMAN,
Plaintiff-Appellee/Cross-Appellant,

vs.

000271

JEFF LEWIS d/b/a LEWIS MOTOR COMPANY,
LEWIS AUTOMOTIVE SALES, and LEWIS
PERFORMANCE AUTOMOTIVE,
Defendant and Counterclaimant/
Cross-Appellant.

JEFFREY LEWIS d/b/a LEWIS MOTOR COMPANY,
Cross-Petitioner/Cross-Appellee,

vs.

CENTRAL STATES AUTO AUCTION, INC.,
Third-Party Defendant and Counterclaimant,

JEFF SMID d/b/a JEFF SMID AUTO,
Third-Party Defendant and
Counterclaimant Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Howard County,
James L. Beeghly, Judge.

The third-party defendant, Jeff Smid, appeals from the
district court's judgment awarding plaintiff damages for
Smid's fraudulent misrepresentation regarding a car rebuilt
by Smid and ultimately sold to plaintiff. **AFFIRMED.**

Judith O'Donohoe of Eggert, Erb, Ott, O'Donohoe & Frye,
Charles City, for appellant.

James Burns of Miller, Pearson, Gloe, Burns, Beatty &
Cowie, P.C., Decorah, for appellee.

Heard by Schlegel, P.J., and Hayden and Habhab, JJ.

HAYDEN, J. 000272

This controversy involves the sale and purchase of a 1986 Oldsmobile. It was rebuilt after the front end of the vehicle was extensively damaged in an accident. Jeff Smid purchased the 1986 vehicle and rebuilt it by replacing the damaged front portion with the front portion of a 1985 Oldsmobile. The portions were welded together. The resulting vehicle is referred to as a "builder." Smid placed the vehicle identification number from the front of the 1986 model onto the front of the rebuilt vehicle. An inspector for the Iowa Department of Transportation examined the rebuilt vehicle on August 30, 1988, and issued an inspection certificate. This permitted Smid to obtain a title and registration for the vehicle. The title received by Smid did not need to indicate the vehicle was a builder. Iowa Code § 321.52 (1987) (amended 1988). If the inspection certificate, however, had been issued after September 1, 1988, the car title would have required to show the vehicle was rebuilt. Motor Vehicle Fraud and Theft, and Wrecked, Salvaged, Junked, and Rebuilt Vehicles Act, ch. 1089, 1988 Iowa Acts 97 (codified as amended Iowa Code § 321.52(4)(b) (1991)).

In February 1989 Smid sold the rebuilt vehicle through a Des Moines auto auction to a Waterloo car dealer. Smid did not advise the auction company the vehicle was a builder. The failure to inform did not follow a custom and practice of the auto auction industry. The Waterloo car

000273

dealer discovered the vehicle had been rebuilt and returned it to the auto auction. The vehicle was returned to Smid in March of 1989. On April 26, 1989, Smid attempted to sell the rebuilt vehicle through a Mason City auction. Lewis Motor Company, a used car dealership, purchased the vehicle at the auction. The parties dispute whether Smid informed the auction house the vehicle was a builder. The used car dealership claims there was no announcement the vehicle was a builder. Smid, however, alleges he informed the auction house about the vehicle's salvage history. The owners of the used car dealership did not discover the vehicle was a builder prior to its sale to the plaintiff, Mary Lee Hoffman.

On May 19, 1989, Lewis's used car dealership sold the vehicle to plaintiff for the sum of \$8500. The purchase agreement contained a general disclaimer of warranties. The agreement, however, provided a thirty-day warranty on internal engine parts provided the work was done at the dealership. During the next seven or eight months, while the car was in plaintiff's possession, the vehicle required extensive repairs. Some of the repairs were needed because the vehicle was a builder and other repairs were needed because of ordinary wear and tear.

On January 31, 1990, the Iowa Highway Patrol seized the rebuilt vehicle pursuant to a search warrant. The warrant was based on the irregularities with the vehicle's identification number. Plaintiff requested a hearing,

000274

seeking a return of the vehicle. On March 21, 1991, an administrative law judge determined Smid had met the legal requirements involving the antitheft law. The judge concluded title was properly in the name of plaintiff and ordered the vehicle be returned to her. In May of 1991 the vehicle was returned to plaintiff.

On October 26, 1990, plaintiff filed a petition against Jeffrey Lewis alleging breach of contract, breach of warranty of title, breach of an expressed warranty, and breach of implied warranty. Lewis filed an answer denying the allegations. He also filed a cross-petition against the auction company where he had purchased the vehicle and Smid as the seller of the vehicle. Plaintiff filed an amendment to the petition alleging negligence, fraudulent misrepresentation, and negligent misrepresentation against Lewis. Plaintiff filed a second amendment to the petition alleging fraudulent misrepresentation and seeking punitive damages against third-party defendant Jeff Smid. Plaintiff's breach of warranty of title claim was later dismissed. Lewis settled with the auction company and Smid and agreed to dismiss his claims against them and to undertake the defense of Smid as against the claims of the plaintiff.

The case was tried to the court on December 18-19, 1991. At the close of the plaintiff's evidence, Smid moved for a dismissal of plaintiff's claims of fraudulent misrepresentation and punitive damages. The court reserved

ruling on the motion. On January 14, 1992, the district court entered a ruling regarding the action. The court found Smid failed to advise the auction houses the vehicle was a builder, and this failure was intentional and designed to deceive the purchaser. The court determined plaintiff suffered actual damages in the amount of \$2830. These damages consisted of the difference in the value between the vehicle as represented and as actually sold (\$2000), the loss of use of the vehicle for a reasonable period of two months (\$600), loss of use of the vehicle while in the shop for repairs (\$30), and inconvenience while obtaining repairs resulting from the vehicle being a builder (\$200). The court also awarded plaintiff punitive damages in the amount of \$5000 against Smid. Additionally, the court determined plaintiff had failed to prove any theory of recovery against Jeff Lewis.

Smid filed posttrial motions requesting the district court to enlarge its findings to include a ruling on the request for a directed verdict and a request for dismissal of the case against him. On March 3, 1992, the district court overruled the posttrial motions of all parties. Smid appeals, and Hoffman cross-appeals.

Our standard of review is for the correction of errors at law. Iowa R. App. P. 4. We evaluate the sufficiency of the evidence in the light most favorable to sustaining the district court's judgment. *Hoelscher v. Sandage*, 462 N.W.2d 289, 291 (Iowa App. 1990) (citing *Grefe v. Ross*, 231

000276

N.W.2d 863, 865 (Iowa 1975)). We need only consider the evidence favorable to the judgment, whether or not it is contradicted. Id. The district court's findings of fact are binding on us if supported by substantial evidence. Id.

I. Fraudulent Representation. Jeff Smid contends the district court erred in finding him liable for fraudulent misrepresentation.

The elements of fraud are: "(1) a material misrepresentation (2) made knowingly (scienter) (3) with intent to induce the plaintiff to act or refrain from acting (4) upon which the plaintiff justifiably relies (5) with damages." *Beeck v. Kapalis*, 302 N.W.2d 90, 94 (Iowa 1981) (citations omitted). The district court found plaintiff established these elements by a preponderance of evidence. We conclude substantial evidence supports the district court's finding.

The general rule is mere silence in an arm's length transaction does not necessarily create actionable fraud. *Smith v. Peterson*, 282 N.W.2d 761, 767 (Iowa App. 1979) (citations omitted). There is an exception, however, when one party has superior knowledge of facts, resulting in an inequality of condition or knowledge between parties. Id. (citations omitted). This exception imposes a duty upon the party with superior knowledge to disclose material facts which may be favorable to him and unfavorable to the other party. Id. (citation omitted). Smid had superior

000277

knowledge of a material fact regarding the vehicle's condition because he rebuilt the vehicle and knew it was a builder. Evidence shows Smid failed to make this fact known to plaintiff. This misrepresentation was material to plaintiff's decision to purchase the vehicle. She relied on the truth of representations made about the vehicle. Plaintiff was damaged as a result of the transaction. She did not receive the vehicle Smid represented, which was a 1986 Oldsmobile. Instead, she received only one-half of the vehicle represented. Smid had a duty to reveal the vehicle was a builder but failed to reveal this fact to Hoffman and the auction houses. Such a duty can arise from a relation of trust, a relation of confidence, inequality of condition and knowledge, or other circumstances as shown by a particular fact situation. Irons v. Community State Bank, 461 N.W.2d 849, 854 (Iowa App. 1990).

A defendant may also be liable for fraud when he makes a misrepresentation recklessly, with careless disregard for whether it was true or false. Beeck, 302 N.W.2d at 95. A misrepresentation need not be an affirmative statement. Irons, 461 N.W.2d at 854. Misrepresentation also denotes silence resulting from the failure to disclose the existence of something which the other person has reason to believe would be disclosed. Sedco Int'l, S.A. v. Cory, 522 F. Supp. 254, 323 (S.D. Iowa 1981), *aff'd*, 683 F.2d 1201 (8th Cir. 1982), *cert. denied*, 459 U.S. 1017 (citation omitted); Irons, 461 N.W.2d at 854 (citing Sinnard v.

Roach, 414 N.W.2d 100, 105 (Iowa 1987)). Evidence supports a finding Smid acted recklessly and with careless disregard toward plaintiff by remaining silent as to the condition of the vehicle.

We conclude substantial evidence supports the district court's finding Smid fraudulently misrepresented the condition of the vehicle purchased by plaintiff. We affirm the district court on this issue.

II. Punitive Damages. Smid argues the district court erred in assessing punitive damages against him.

Our courts have frequently stated punitive damages are justified where a defendant acts maliciously. Sinnard, 414 N.W.2d at 107 (citing Beeck v. Aquaslide, 350 N.W.2d 149, 167 (Iowa 1984)). Malice may be implied in cases where the defendant acts improperly with willful or reckless disregard for another's rights. Id. In this case, Smid intentionally avoided disclosure of the vehicle's condition by selecting procedures for titling and registering the vehicle which would not reveal the vehicle was rebuilt, and failing to inform the auction houses the vehicle was a builder. Smid had the vehicle inspected on August 30, 1988. As a result, his title and registration for the vehicle did not need to reveal the vehicle was a builder. Iowa Code § 321.52(4) (1987) (amended 1988). A title and registration issued on the basis of an inspection conducted on or after September 1, 1988, is required to reveal if the vehicle had been rebuilt. Iowa Code § 321.52(4)(b)

(1991). Evidence shows Smid had also attempted to sell the vehicle at an auction earlier but it was returned to him because he had failed to reveal it was a builder. Smid's conduct justifies the imposition of punitive damages. We conclude substantial evidence supports an award of punitive damages against Smid. See Sinnard, 414 N.W.2d at 107. The district court did not err in assessing punitive damages against Smid. We affirm the district court on this issue.

III. Liability of Lewis. On cross-appeal Plaintiff Hoffman contends the district court erred in finding Lewis was not liable for losses suffered by her. The district court concluded without discussion Hoffman failed to prove a claim against Lewis under any theory of recovery raised by her. We affirm this decision.

There is no evidence proving Lewis breached an express warranty. See Iowa Code § 554.2313 (1991). Plaintiff failed to present evidence showing Lewis breached an express warranty as to the condition or model of the vehicle. Plaintiff has also failed to prove fraudulent misrepresentation. She has not presented evidence showing Lewis intentionally misrepresented the vehicle. Plaintiff's implied warranty claim is negated by the "as is" clause contained in the sales contract. Iowa Code § 554.2316(3) (1991); U.C.C. 2-316 (1977).

Plaintiff failed to cite authority in support of her negligence claim against Lewis. This failure amounts to a waiver of the issue. Bush v. Iowa District Court, 369 N.W.2d 424, 425-26 (Iowa 1985); Iowa R. App. P. 14(a)(3).

Finally, we address plaintiff's negligent misrepresentation claim against Lewis. In *Meier v. Alfa-Laval, Inc.*, the Iowa Supreme Court adopted the view a negligent misrepresentation tort does not apply to a person involved in the selling of merchandise. *Meier v. Alfa-Laval, Inc.*, 454 N.W.2d 576, 582 (Iowa 1990); *Budget Mktg. Inc. v. Centronics Corp.*, 927 F.2d 421, 428-29 (8th Cir. 1991) (tort not apply to a vendor of merchandise, but applies to a person in the business of supplying information). In light of *Meier* we must conclude plaintiff has failed to prove a negligent misrepresentation claim against Lewis.

IV. Loss of Use Damages. The district court awarded Hoffman two months of car rental at the rate of \$300 per month. Hoffman argues this aspect of the district court's damage award was insufficient. Plaintiff seeks additional damages in the amount of \$3600. She contends Smid should reimburse her for the fourteen months preceding trial during which she rented a vehicle for \$300 per month. We disagree. We conclude the award of \$600 for rent was reasonable and adequate. See *Long v. McAllister*, 319 N.W.2d 256, 261 (Iowa 1982). We affirm the damages awarded by the district court.

AFFIRMED.