FILED
MAR 16 1989
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

DOUGLAS R. OWENS,

Plaintiff-Appellee,

vs.

HARKEMA CHEVROLET, INC.,

Defendant-Appellant.

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8-713
88-901

Appeal from the Iowa District Court for Jasper County (No. 99296), Peter A. Keller, Judge.

Defendant appeals a damage award for fraud in an odometer violation. **AFFIRMED.**

David D. Dixon, of Heslinga, Heslinga, Dixon & Grotewold, Oskaloosa, for defendant-appellant.

John E. Billingsley, of Walker, Knopf & Billingsley, Newton, for plaintiff-appellee.

Considered by Schlegel, P.J., and Hayden and Sackett, JJ.

SACKETT, J.

This is an appeal in a civil action for damages filed pursuant to 15 U.S.C. section 1981 et seq., and Iowa Code section 714.16, alleging fraud as to the odometer reading on an automobile purchase by plaintiff-appellee Douglas R. Owens. We affirm.

Defendant-appellant Harkema Chevrolet, Inc., is engaged in automobile sales in New Sharon, Iowa. On March 14, 1986, defendant purchased a used 1981 Chevette from a Kansas City auto auction house. The Chevette was sold in December, 1981, and repossessed by G.M.A.C. on November 15, 1985. The car was shown to have 100,091 miles on it at that time. When defendant purchased the car in 1986 the odometer reading was 48,225 miles. Defendant purchased it by sealed bid for $322. It was towed back to New Sharon and on April 11, 1986, defendant sold the car to Bill's Used Cars at Kellogg, Iowa for $800. When sold to Bill's Used Cars the odometer read 48,500 miles. Bill's repainted the car and had it reupholstered, and sold it on June 16, 1986, to plaintiff for $1,800. At that time the odometer read 48,511 miles.

The sales slip defendant received from the auction house when the car was purchased showed an odometer reading of 48,225 miles. In mid-April 1986 defendant received through the mail G.M.A.C.'s odometer statement and title to the Chevette, which showed 100,091 miles. Defendant had already sold the car to Bill's Used Cars. Bill's was not

notified. Defendant's bookkeeper was instructed on the application for the Iowa title to show the mileage as "unknown." An Iowa title was issued on the car which had typed on the front for mileage "UNK." On April 18, a week after the sale to Bill's, defendant signed the title over to him. On the back of the title an odometer reading was penciled in as 48,510 miles. An employee of defendant admitted, other than having "unknown" indicated on the mileage on the front of the title, they did not then advise Bill's of the discrepancy. Bill testified he "goofed" and did not view the front of the title, and had a new Jasper County title issued showing on the front as actual mileage 48,511 on July 1, 1986.

Plaintiff filed suit against defendant and Bill's and later plaintiff amended his petition to add G.M.A.C. as a party-defendant. Prior to trial plaintiff settled with G.M.A.C. for $1,235, and Bill's was dismissed out. The case proceeded to trial solely against defendant. The trial court found for plaintiff and awarded plaintiff treble damages under 15 U.S.C. section 1989 for $3,265 plus attorney fees. Defendant appeals.

I.

Defendant contends the evidence was insufficient as a matter of law to establish an intent to defraud under 15 U.S.C. section 1989,. Section 1988 provides:

Section 1988. Disclosure requirements upon transfer of ownership of motor vehicle:

(a) **Promulgation of rules.** Not later than 90 days after the date of enactment of this Act [enacted Oct. 20, 1972], the Secretary shall prescribe rules requiring any transferor to give the following written disclosure to the transferee in connection with the transfer of ownership of a motor vehicle:

(1) Disclosure of the cumulative mileage registered on the odometer.

(2) Disclosure that the actual mileage is unknown, if the odometer reading is known to the transferor to be different from the number of miles the vehicle has actually traveled.

Such rules shall prescribe the manner in which information shall be disclosed under this section and in which such information shall be retained.

(b) **Violations of rules and giving false statements to transferees prohibited.** No transferor shall violate any rules prescribed under this section or give a false statement to a transferee in making any disclosure required by such rule.

(c) **Acceptance of incomplete written disclosure by transferees acquiring ownership for resale prohibited.** No transferee who, for purposes of resale, acquires ownership of a motor vehicle shall accept any written disclosure required by any rule prescribed under this section if such disclosure is incomplete.

Section 1989 then provides for civil liability for violations, and states:

Section 1989. Civil actions to enforce liability for violations of odometer requirements; amount of damages; jurisdiction; period of limitation.

(a) Any person who, with intent to defraud, violates any requirement imposed under this title [15 USCS Section 1981 et seq.] shall be liable in an amount equal to the sum of:

(1) three times the amount of actual damages sustained or $1,500, whichever is the greater; and

(2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with reasonable attorney fees as determined by the court.

* * *

The statute requires an "intent to defraud" for imposition of civil penalties. The element of intent is a requisite showing by the person who seeks recovery. Harden v. Gregory Motors, 697 P.2d 283, 287 (Wyo. 1985). Although a failure to disclose cumulative mileage to a transferee is a violation of section 1988, the statutory remedy under section 1989 applies only where there is an intent to defraud. Hensley v. Lubbock National Bank, 561 S.W.2d 885, 890 (Tex. 1978).

A transferor who lacks actual knowledge may still be found to have intended to defraud; and where the transferor reasonably should have known an odometer reading was incorrect, a court may infer that he understood the risk of such an occurrence. Nieto v. Pence, 578 F.2d 640, 642 (5th Cir. 1978). Constructive knowledge, recklessness, or even gross negligence in determining and disclosing a car's actual mileage have been held sufficient to support a finding a dealer acted with intent to defraud. Oettinger v. Lakeview Motors, Inc., 675 F.Supp. 1488, 1493 (E.D. Va. 1988). In Aldridge v. Billips, 656 F.Supp. 975, 978 (W.D. Va. 1987).

The trial court in its findings recited the following facts supporting an inferred intent to defraud on defendant's part:

a. Purchase price of $322.00;

b. Condition of car, i.e. damage, needed paint job and new upholstery;
c. Carelessness in verifying paperwork at auto auction;
d. Quickness of resale upon return to Iowa;
e. Conscious failure to properly notify Bill's after the paperwork came through, which was before the car was sold by Bill's to the plaintiff.

The findings made by the trial court are supported by substantial evidence. We have considered the court's finding and determine they are sufficient to support a finding defendant, a car dealership, knew or reasonably should have known the odometer reading was incorrect and the car had not nearly 50,000 miles on it but rather it had 100,000[1] miles on it. We find substantial evidence to support the trial court's findings.

II.

Defendant claims the trial court erred in determining the proper measure of damages. The trial court held the difference in value of the auto because of the odometer discrepancy was $1,500, and that plaintiff was entitled to treble damages under section 1989, plus costs and attorney fees. (The $4,500 total was then reduced by $1,235 credit as a setoff for G.M.A.C.'s settlement.) There was testimony the value between a 1981 Chevette with 100,000 miles and with 48,000 miles in mid-1986 was $1,500 to $2,000. We find substantial evidence to support the trial court's findings on this issue.

AFFIRMED.

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1. The evidence would indicate the vehicle probably had nearly 150,000 miles on it.