FILED
MAR 26 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ERLENE HULL,	)	
Plaintiff-Appellee,	)	Filed March 26, 1985
vs.	)	
LEO'S ENTERPRISES, INC., d/b/a **LEO'S AUTOLAND, and MERCHANTS MUTUAL BONDING CO.,**	)	4-476 / 84-266
Defendants-Appellants.	)	

Appeal from the Iowa District Court for Polk County - Norman D. Elliott, District Associate Judge.

Defendants dealer and surety appeal from judgment for plaintiff in an action seeking damages arising out of the sale of a used car. AFFIRMED IN PART AND REVERSED IN PART.

Donald W. Baird of Baird, Bowers, Holliday & Wilson, Des Moines, for defendant-appellant Leo's Enterprises, Inc.

F. Richard Lyford of Dickinson, Throckmorton, Parker, Mannheimer & Raife, Des Moines, for defendant-appellant Merchants Mutual.

Michael A. Levine, Des Moines, for plaintiff-appellee.

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

DONIELSON, P.J.

Defendants dealer and surety appeal from a judgment for the plaintiff in an action seeking damages arising out of the sale of a used car. Defendant dealer asserts that evidence is insufficient to support a finding that it defrauded the plaintiff in the sale of the automobile. Defendant surety asserts 1) that there is no basis for liability under the statutory motor vehicle dealer's bond and 2) that the nunc pro tunc order imposing liability was erroneous and improperly entered without notice or hearing. We affirm in part and reverse in part.

On July 26, 1982, Erlene Hull purchased a 1976 Ford Pinto from Leo's Enterprises, Inc., after a salesman told her, "It's a good car and less gas mileage for you to worry about." She traded in a 1968 Buick and financed approximately $1,300 on the purchase price from a finance company. Mrs. Hull signed a sales agreement which contained a provision disclaiming all warranties. On the day of the sale, the vehicle was inspected at Monkey Wrench Garage. The Pinto passed inspection as required by statute and title was transferred to Mrs. Hull.

The plaintiff experienced problems with the automobile immediately after the purchase. The engine failed and was replaced at the dealer's expense by the garage which had performed the initial inspection. Other problems subsequently developed and on several occasions Mrs. Hull took the vehicle back to the dealer or garage to have it fixed. On October 4, 1982, the vehicle was reinspected by Mike Chelsvig, a mechanic at Montgomery Ward. It failed to pass inspection for several reasons. Mr. Chelsvig testified that the vehicle was "junk, more or less" and that it wasn't safe to drive.

On April 8, 1983, Mrs. Hull filed a petition at law seeking damages from the dealer. She also sought damages from the surety under the motor vehicle dealer's bond required by Iowa Code section 322.4(7). The case was tried without a jury.

On January 30, 1984, the court entered its finding of facts and conclusions of law. Initially, the court described the case as an action seeking 1) damages from

the dealer for selling an inoperable, defective automobile in violation of Iowa Code sections 321.238(12) and (18), and 2) damages from the surety for failure to have the vehicle properly inspected prior to sale. However, in concluding that the dealer was liable, the court stated other grounds for liability including fraud and implied warranties of merchantability and fitness for a particular purpose.

Judgment was entered against the dealer, and plaintiff was awarded actual damages of $1,325.50 and punitive damages of $2,000.00. The action against the surety was dismissed. Without notice or further hearing, the court sua sponte entered a nunc pro tunc order imposing secondary liability on the surety in the amount of $1,325.50, in the event that the dealer failed to satisfy the judgment.

The dealer filed notice of appeal and the surety filed an application to certify appeal pursuant to Iowa Rule of Appellate Procedure 3. By order of the Iowa Supreme Court, it was determined that the jurisdictional amount was satisfied and that the surety had timely appealed as a matter of right.

Defendant dealer's sole claim on appeal is that evidence does not support a finding of fraud. Although the trial court characterized the cause of action as statutory in nature, it is apparent that its judgment was, at least in part, based on fraud. Thus, we deem it appropriate to address this issue.

Fact findings of the trial court have the effect of a special verdict and are considered binding if supported by substantial evidence. C. F. Sales, Inc. v. Amfert, Inc., 344 N.W.2d 543, 553 (Iowa 1983). Substantial evidence has been defined as evidence that "a reasonable mind would accept as adequate to reach a conclusion." Briggs v. Hinton Community School District, 282 N.W.2d 740, 743 (Iowa 1979).

Applying these principles, we conclude that the trial court's finding of fraud should not be disturbed. In order for a litigant to prevail on a theory of fraud, he must show the following elements: 1) representation, 2) falsity, 3) materiality, 4) scienter, 5) intent to deceive, 6) reliance, and 7) resulting injury and damage. Hall

. Wright, 156 N.W.2d 661, 666 (Iowa 1968). We believe that these elements were established by substantial evidence. Erlene Hull was told by a salesman that the vehicle in question was a "good car" and that it was merchantable. Clearly this statement was false; the extensive problems that the plaintiff had with the vehicle are indicative of its poor condition. The defendant in this action was in the business of selling automobiles and we find it difficult to believe he was unaware of the condition of the vehicle. He either knew or should have known that it was not an operable automobile and it should not have been sold for use on streets and highways.

The dealer argues that since Mrs. Hull purchased the vehicle "as is" there can be no intent to deceive. We disagree. An "as is" clause in the purchase agreement may have served to exclude implied warranties of merchantability and of fitness for a particular purpose. However, it does not negate the fact that the defendant made oral representations that the vehicle was in good operating condition. Mrs. Hull relied on these representations and purchased the car. She drove it for a distance of only 267 miles before it literally fell apart.

We conclude that the evidence supports a finding of fraud. The defendant's attempt to characterize the facts in a different light is unpersuasive. The dealer suggests that the record shows he "did all that could feasibly have been expected of him to satisfy the purchaser." However, the fact that a different conclusion can be drawn from the evidence is not a sufficient ground for reversal. The trial court's finding of fraud is supported by substantial evidence. This is all that is required. We therefore affirm the judgment against the dealer.

The next issue before this court is the surety's claim that there is no basis for liability under the statutory motor vehicle dealer's bond. We agree. Iowa Code section 322.4(7) provides in pertinent part:

> Before the issuance of a motor vehicle dealer's license to a dealer engaged in the sale of vehicles for which a certificate of title is required under chapter 321, the appli-

> cant shall furnish a surety bond executed by the applicant as principal and executed by a corporate surety company, licensed and qualified to do business within this state, which bond shall run to the state of Iowa, be in the amount of twenty-five thousand dollars and be conditioned upon the faithful compliance by the applicant as a dealer with all of the statutes of this state regulating or applicable to the business of a dealer in motor vehicles, and indemnifying any person who buys a motor vehicle from the dealer from any loss or damage occasioned by the failure of the dealer to comply with any of the provisions of chapter 321 and this chapter, including, but not limited to, the furnishing of a proper and valid certificate of title to the motor vehicle involved in a transaction. . . .

(emphasis added). Pursuant to this section, the dealer must be found to have violated some provision of chapter 321 or 322 before the surety can be held liable on the bond. "A surety's liability may not be enlarged by implication." State Surety Co. v. Lensing, 249 N.W.2d 608, 611 (Iowa 1977).

Chapters 321 and 322 do not impose liability on the dealer for fraud or breach of warranty. Consequently, the trial court's findings in this respect cannot serve as a basis for recovery against the surety. Plaintiff, however, argues that the surety should still be held liable based on the trial court's finding that "a proper inspection was not made and it was not given to the plaintiff at the time of the sale." We disagree. Section 321.238 [now repealed] provided that it was the responsibility of the authorized inspection stations to provide for proper inspection. It was not the responsibility of either the car dealer or the surety. Furthermore, the section imposed no obligation on the dealer to give the statement of inspection to the buyer of the vehicle. Rather, the statement was to be delivered by the inspection station. Iowa Code § 321.238(4)(b) (1983). The dealer's obligation with respect to the inspection was set forth in section 321.238(18):

> If an inspection is required by this section a person shall not transfer any motor vehicle, other than transfers to a dealer licensed under Chapter 322, unless there is a valid official certificate of inspection affixed to such vehicle at the time of transfer. Any person violating the provisions of this subsection shall be subject to a fine of one hundred

> dollars and shall be liable to the purchaser in damages for all costs involved in obtaining a valid certificate of inspection for such vehicle

Since this section was complied with in the case at bar, there is no statutory basis for imposing liability on the surety The plaintiff's loss and damage stemmed from the condition of the vehicle, not from violation of chapter 321 and 322. We therefore reverse the trial court's decision in this respect and hold that the surety is not liable for damages

The surety's remaining claim is that the nunc pro tunc order imposing liability on the surety should be considered void. Because of our disposition on the previous issues, we find it unnecessary to consider this claim

AFFIRMED IN PART AND REVERSED IN PART