



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION**

Citation: *Aylward v. Terra Nova Motors Limited*, 2023 NLSC 72

Date: May 5, 2023

Docket: 202101G6411

BETWEEN:

GORDON AYLWARD

APPELLANT

AND:

TERRA NOVA MOTORS LIMITED

RESPONDENT

Before: Justice Vikas Khaladkar

On Appeal From: A Decision of the Provincial Court of Newfoundland and Labrador, sitting as a Small Claims Court pursuant to the *Small Claims Act*, File # 0121C00039 dated the 19th day of October, 2021.

Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: April 13, 2023

Summary:

The trial judge's decision contained no reversible error. The appeal is dismissed.

Appearances:

Gordon Aylward	Appearing on his own behalf
Kyle S. Mercer	Appearing on behalf of the Respondent

Authorities Cited:

CASES CONSIDERED: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235

STATUTES CONSIDERED: *Small Claims Act*, R.S.N.L. 1990, c. S-16

RULES CONSIDERED: *Small Claims Rules*, N.L.R. 52/97

REASONS FOR JUDGMENT**KHALADKAR J.:****INTRODUCTION**

[1] The Appellant purchased a used Audi automobile from the Respondent for almost \$20,000. The five year old car was equipped with a standard transmission. Shortly after leaving the Respondent's car lot the engine light came on. The Appellant returned to the dealership and, after some discussion, it was agreed that he would bring the vehicle back after the weekend to have the light attended to.

[2] Two days following the purchase the Appellant decided to take the car for a drive on the highway. He reached Butter Pot Park on the Trans-Canada Highway when the car broke down. It was towed back to the dealership.

[3] It was determined that the clutch assembly of the vehicle had disintegrated.

[4] The car was advertised as having been subjected to a 150-point inspection approved by General Motors. It was also the subject of a 30-day, 5,000 kilometer (“km”) warranty. The Appellant said that he relied upon the website to which he was referred by the Respondent and, as a result, concluded that the vehicle was warranted against all defects for a period of 30 days and 5,000 kms. The website stated as follows:

MANUFACTURER’S WARRANTY

... You also get a minimum of 3 months or 5,000 kilometers (whichever comes first) Used Vehicle Limited Warranty when you purchase a Certified Pre-Owned Vehicle. That’s standard. If your budget permits, you can extend or upgrade to an even more comprehensive Certified Pre-Owned Vehicle Protection Plan.

[5] The trial judge dismissed the Appellant’s claim.

THE TRIAL JUDGE’S DECISION

[6] The trial judge indicated that the law pertaining to contract, negligent misrepresentation and fraudulent misrepresentation were in play in this case. He stated that the Appellant had the burden to prove, on a balance of probabilities, the essential ingredients of his claim.

[7] The trial judge held that, despite the existence of an exclusion clause in the contract of purchase and sale of this automobile that excluded all liability and denied any warranties, the car dealership nevertheless provided a warranty.

[8] The trial judge found, as a fact, that the car dealership’s salesperson did not know about any defect in the clutch assembly of the vehicle purchased by the Appellant. In addition, the trial judge accepted the testimony of the car dealership’s service manager that the failure of the clutch assembly was likely due to improper driving – “riding the clutch”.

[9] The trial judge accepted the service manager's testimony that the warning light had nothing to do with the failure of the clutch assembly. A review of the transcript of evidence indicates that the warning light related to a fault of an electrical component, whereas the clutch assembly has no electrical components and there is no warning light associated with it.

[10] The trial judge indicated that, when buying a used vehicle, there is an element of risk and the maxim of *caveat emptor* or buyer beware operates. He found that by paying additional monies you can mitigate the risk by obtaining better coverage against potential loss.

[11] The trial judge found that the Appellant had the ability to take the vehicle for a third party inspection, but that he did not do so.

[12] The trial judge found that there was no proof that there had been any negligent misrepresentation or fraudulent representation on the part of the car dealership, its agents or employees. The trial judge found, as a fact, that the salesperson made full disclosure concerning the condition of the vehicle and the risks to be assumed by the Appellant in making the purchase.

GROUND OF APPEAL

[13] The Appellant appealed on a number of grounds. It is, perhaps, best to set out those grounds as issues – in the same order that the Appellant did in his appeal brief. I have edited them for brevity.

ISSUES

Issue 1 - Did the trial judge err in finding that the exclusion clauses in the agreement for purchase and sale excluded fraudulent misrepresentation?

Issue 2 - Did the trial judge err in failing to set out the elements of fraudulent misrepresentation in considering whether the evidence supported the Appellant's claim?

Issue 3 - Did the trial judge err in law by cancelling two of the Appellant's subpoenas without any input from the Appellant?

Issue 4 - Did the trial judge err by failing to order the production of documents required by the subpoena served on the car dealership's general manager?

Issue 5 - Did the trial judge err in ignoring documentary and testimonial evidence in his assessment of witness credibility?

Issue 6 - Did the trial judge err in admitting opinion evidence from the car dealership's mechanic that the Appellant's improper driving had caused the clutch failure?

STANDARD OF REVIEW

[14] The appropriate standard of review was expressed in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235. In that case the Supreme Court of Canada instructed that a court of appeal should not interfere with a trial judge's reasons unless there is palpable and overriding error. In other words, if there was some evidence upon which the trial judge could have come to a particular conclusion, the appellate court is enjoined from interfering with it.

[15] An appeal from the Small Claims Court is not an appeal *de novo*. The appellate court is not entitled to substitute its views for the views of the trial judge based upon its own view of the evidence.

[16] A palpable error is one that is plainly visible.

[17] On a pure question of law the standard is correctness. If a legal error be found in the trial judge's reasons, the appellate court is free to replace the trial judge's opinion on the law with its own.

[18] At paragraph 23 of the *Housen* decision, the Court said:

We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the *inference-drawing process itself* is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to underlying facts. ...

[emphasis in original]

ANALYSIS

Issue 1 - Did the trial judge err in finding that the exclusion clauses in the agreement for purchase and sale excluded fraudulent misrepresentation?

[19] The trial judge found that there were exclusion clauses, at paragraphs 14 and 15 of the vehicle purchase agreement that limited the car dealerships' liability with respect to defects in the used automobile being sold. However, the trial judge indicated that the car dealership chose to ignore the terms of the written contract and provided a warranty on used cars sold by them although they were not legally obligated, by the agreement, to do so.

[20] The trial judge did not find that exclusion clauses in this agreement for purchase and sale excluded fraudulent misrepresentation. Had he done so he would, of course, have been wrong because it is trite law that fraud can vitiate a contract.

[21] The trial judge did not err in this regard.

Issue 2 - Did the trial judge err in failing to set out the elements of fraudulent misrepresentation in considering whether the evidence supported the Appellant's claim?

[22] The trial judge said at page 9 of his decision, lines 9 – 25 as follows:

So, as I say, just to go back at this concept of negligent misrepresentation or fraudulent misrepresentation, that requires proof to satisfy me. It's one thing to make an assertion about something, but the courts have to go on proof, legal proof. And in my view, none exists sufficient to ground the successful claim by the Plaintiff on this, on this basis. There's no evidence of any misrepresentation, in my view, on the part of the Defendant or its agents or employees. Indeed, it appears to me from the evidence of Mr. Nolan and the others that there was full disclosure by Mr. Nolan and subsequently on the condition of the vehicle and the risks assumed by the Plaintiff in making this purchase.

[23] Clearly, the trial judge is making a finding of fact. He is saying that there is no evidence of any misrepresentation on the part of the Respondent or its agents or employees. He found, as a fact, that there was full disclosure by the salesperson, Mr. Nolan, on the condition of the vehicle and the risks assumed by the Appellant in making the purchase.

[24] The parties had an exchange at pages 185 and 186 of the transcript relating to the issues surrounding misrepresentation. It is clear from the exchange that the trial judge understood the elements that needed to be proved in order to sustain a claim of negligent or fraudulent misrepresentation. This is the exchange between the trial judge and the Appellant:

MR. AYLWARD:

Q. That's what I'm saying. My claim is not in contract.

THE COURT:

Q. Yours is in tort?

MR. AYLWARD:

Q. The Plaintiff claims for fraudulent and negligent representation inducing the Plaintiff to purchase a vehicle which the Defendants knew was –

...

MR. AYLWARD:

Q. So, I'm in tort.

THE COURT:

Q. - your - you frame your claim in tort –

MR. AYLWARD:

Q. Absolutely.

THE COURT:

Q. So, you got to establish now in the evidence that Mr. Nolan knew about the faulty clutch, knew that it was going to fail or likely to fail, and sort of strung you along anyway. Where's the evidence of that?

MR. AYLWARD:

Q. Well, also the fact that they refer me to a website and tell me for three months or 5,000K I don't have to worry. That induced me fraudulently because they didn't show me about any exclusions –

...

[25] One can infer from this exchange that the trial judge understood that negligent, or fraudulent, misrepresentation on the part of the salesperson required proof of knowledge, on his part, that the part was defective and likely to fail and affirmative action to either suppress that fact or induce the purchaser into purchasing the vehicle by remaining silent about the defect or trying to hide it.

[26] The Appellant then stated that his claim was, in fact, related to the website that he was referred to that told him “for three months or 5,000K I don't have to worry”.

[27] The trial judge had the benefit of Mr. Nolan's testimony concerning the issue of the warranty. He had testified, at pages 193 and 194 of the transcript of October 18, 2021 as follows:

- Q. Okay. Did you and Mr. Aylward enter into any conversation with regard to the CPO three-month 5,000 kilometre warranty on the Audi?
- A. Yes, we did.
- Q. Was there anything – was there any indication that Mr. Aylward didn't understand the key undertakings of the GM CPO warranty and its coverages?
- A. There was. Apparently Mr. Aylward had looked up CPO and it was a US CPO program, so we discussed our program.
- Q. Did you discuss that the warranty did not coverage maintenance items, i.e. known as wear and tear items?
- A. Yes, we did.
- Q. Is this a conversation you have with all customers?
- A. Always.
- Q. Why?
- A. Because if you are purchasing a certified preowned vehicle, there's four different categories that's important to us and to GM to sell that vehicle which gives the customer reassurance on mechanical defects and regular wear and tear items are not covered under that, under that program, brakes, clutches and like fan belts. So, what they do is they give you a good peace of mind for three months.

...

[28] The trial judge was entitled to accept, and did accept, Mr. Nolan's testimony.

[29] The Appellant stated, in submissions to me, that he interpreted the word "limited" in the website's description of the three month/5,000 km warranty as meaning that it was limited to three months and 5,000 kms. This interpretation was not argued before the trial judge. Before the trial judge the Appellant merely argued that he was misled by the website into thinking that he had a comprehensive warranty for three months and 5,000 kms.

[30] The Appellant's argument lacks merit. The Appellant is legally trained and practiced law for a number of years. No reasonable person could mistake the term "limited warranty" as meaning that it was limited to the term of the warranty in time or mileage but, otherwise, was comprehensive. I reproduce the wording again for ease of reference:

You also get a minimum of 3 months or 5,000 kilometers (whichever comes first) Used Vehicle Limited Warranty when you purchase a Certified Pre-Owned Vehicle. That's standard. If your budget permits, you can extend or upgrade to an even more comprehensive Certified Pre-Owned Vehicle Protection Plan.

[31] You get a Used Vehicle Limited Warranty, conscripted by time and distance, which you can extend (by time and/or distance) or upgrade (to cover additional types of failure) to an even more comprehensive plan. If, as the Appellant contends, the limitation meant that the vehicle coverage was limited to three months and 5,000 kms but was otherwise comprehensive in every respect, then the offer to upgrade to an "even more comprehensive Certified Pre-Owned Vehicle Protection Plan" would be completely meaningless. It is clear that the wording offers a basic three month/5,000 km warranty that is capable of being upgraded for an additional fee.

[32] The trial judge accepted Mr. Nolan's evidence that he explained to the Appellant that wear and tear items were not covered. That, coupled with the wording in the website would have alerted a prudent purchaser to the fact that wear and tear items would not be covered by the basic warranty provided by the Respondent.

[33] I see no mistake in the trial judge's characterization of what was required to make out a claim of negligent or fraudulent misrepresentation.

Issue 3 - Did the trial judge err in law by cancelling two of the Appellant's subpoenas without any input from the Appellant?

[34] Rule 12 of the *Small Claims Rules*, N.L.R. 52/97 under the *Small Claims Act*, R.S.N.L. 1990, c. S-16, sets out the procedure to be followed by a witness once the witness has been served with a subpoena. Rule 12(5) deals with cancellation of subpoenas and states:

(5) A person who is served with a subpoena to witness may apply to a judge under rule 19(3) who may cancel the subpoena where

(a) the person is not needed as a witness; or

(b) it would be a hardship for the person to attend court as required by the subpoena.

[35] The Respondent made an application to the trial judge claiming that the requirement to have its entire service management team attend the trial simultaneously would cause considerable economic loss since it would require the Respondent to shut down its service operations for the two days set for the trial.

[36] There is no requirement in the *Small Claims Rules* that notice of the application to cancel, or the cancellation, be given to the other side.

[37] While it might have been a courtesy to advise the Appellant that the requirement to have two subpoenaed witnesses attend the trial had been cancelled, there is no legal requirement in the *Small Claims Rules* that the Court do so.

[38] Accordingly, the trial judge did not err in cancelling the Appellant's witnesses without notice. Had it caused a problem for the prosecution of his case, the Appellant would have been well within his rights to seek an adjournment or a continuation of the trial to have the two cancelled witnesses attend. He did not demand their attendance although he could have done so.

Issue 4 - Did the trial judge err by failing to order the production of documents required by the subpoena served on the car dealership's general manager?

[39] The Appellant wished the dealership's general manager to bring proof of the dealership's dealings with General Motors.

[40] The Appellant's case did not depend, in any way, on proof of the dealership's relationship with General Motors.

[41] The trial judge did not err by not requiring the production of documents. Such a requirement would have unnecessarily obfuscated the issues in the trial.

Issue 5 - Did the trial judge err in ignoring documentary and testimonial evidence in his assessment of witness credibility?

[42] The issues raised by the Appellant in his appeal brief relating to questions of credibility are not germane to the decision that the trial judge was expected to make. It really makes no difference whether the Appellant arranged to have the vehicle towed to the dealership or the dealership undertook to do so. It makes no difference whether the Appellant was, or was not, authorized to take the vehicle to a third party to have it examined before he bought it. It does not matter whether the Appellant did, or did not, know how to drive a manual transmission.

[43] On that last point, liability was not denied because the Appellant misused the manual clutch. It was denied because it was a wear and tear item that was not covered by the warranty. These are all red herrings that have nothing to do with the issues that the trial judge had to adjudicate.

[44] The trial judge believed the evidence of Mr. Nolan, the salesperson, which he was entitled to do. He found that the Appellant had been apprised of the limitations in the warranty that was offered. He found that negligent and fraudulent misrepresentation had not been established in the evidence. These are findings of fact for which some evidence exists. I am, therefore, unable to overturn the trial judge's decision.

Issue 6 - Did the trial judge err in admitting opinion evidence from the car dealership's mechanic that the Appellant's improper driving had caused the clutch failure?

[45] As noted earlier, it matters not whether the Appellant was driving the vehicle properly or improperly. This case is not a case about the Appellant's ability to drive the motor vehicle. It makes no difference.

[46] The trial judge did not err in admitting opinion evidence about what caused the clutch failure. Perhaps the previous owner was guilty of riding the clutch of this automobile. It doesn't matter because the warranty was not voided by the Appellant's negligence, it didn't pertain because that type of loss (wear and tear) was not covered.

CONCLUSION

[47] I perceive neither palpable nor overriding errors made by the trial judge on questions of fact. And I find no incorrect decisions pertaining to the law.

[48] The appeal is dismissed with costs to the Respondent calculated under Column III of the Schedule of Costs.

VIKAS KHALADKAR
Justice