IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

DALE ROOD and CINDY ROOD,	:	
Plaintiffs	:	
	:	
v.	:	No. 99-00,627
	:	
TED FRYE and LINDA FRYE,	:	
Defendants	:	

Opinion Issued November 21, 2000

OPINION and ORDER

In this non-jury trial, the court must determine issues of law and of fact. The legal issue is clear and unequivocal, although it was not fully addressed by counsel for either party. The factual issues are resolved in favor of the plaintiffs.

Findings of Fact

The facts are largely uncontested. In preparation for an auction of their farm and personal property, Ted and Linda Frye contracted with Fraley Auction Company to conduct a public auction on 19 September 1998. To drum up bidders, an advertising flyer was issued. Among other items, the flyer listed a Case 750 Crawler Loader for sale. The flyer stated that the machine had "less than 25 hrs on complete major engine overhaul."

Dale Rood, a part time excavator, was attracted by the flyer and attended the auction because he needed that type of machine and knew that with such an overhaul, the engine could be expected to last for quite a while. Before bidding on the machine he questioned Mr. Frye and was assured a complete engine overhaul had been performed less than one year ago. Mr. Rood, the highest bidder, purchased the machine for $5000.

The terms of the auction, which were printed on each bidding card, stated that all items were sold "as is," with no express or implied warranties.

The first time Mr. Rood used the Case he noticed it did not seem to be running correctly. After only one and one-half hours' use, it conked out completely and has never recuperated. Mr. Rood consulted an expert to inspect the machine and learned that although someone had previously worked on the engine no complete major engine overhaul had been performed, and the work that had been performed was somewhat shoddy. For instance, the oil filter had been placed into the machine backwards. Mr. Rood now wants his money back.

Conclusions of Law

1. The flyer advertising the auction and the statements made by Mr. Frye to Mr. Rood constitute an express warranty that the Case 750 Crawler Loader was used for less than twenty-five hours after a complete major engine overhaul was performed.

2. Mr. Frye breached this express warranty.

3. The express warranty is not disclaimed by the term "as is," which was printed on the bidding cards.

4. Mr. Rood is entitled to a refund of $5000.

DISCUSSION

1. "It is" v. "As is"

Mr. Frye attempts to weasel out of his misrepresentation by arguing that the express warranty he made was obliterated by the "as is" statement. This argument reminds us of a child who tries to excuse a lie by crossing his fingers while uttering the untruth.

Neither counsel could point to definitive law on this issue, which the court finds highly puzzling because it took one law clerk a mere fifteen minutes to locate the answer. The supposedly elusive point of law was patiently awaiting discovery in precisely the spot one would expect to find it: the "Sales" chapter of the Uniform Commercial Code, 13 Pa.C.S.A. § 1101 § 2101 et seq. Two provisions are applicable.

First, § 2316(a) states that one cannot disclaim an express warranty.[1] It first requires one to attempt to construe the two phrases as compatible with one another.[2] If that cannot reasonably be done, then the express warranty wins out. Under either scenario, the express warranty stands and protects the buyer, and that result makes

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[1] This provision contains the usual convoluted language that pervades the UCC and which reads as though written by a non-native speaker of English. Nonetheless, its intent is clear.

[2] It is possible to find no conflict between the express warranty and the "as is" disclaimer because the term "complete major engine overhaul" could be viewed as assuring the engine was in that condition, whereas the "as is" refers to other problems the machine might have. In other words, the buyer is guaranteed *only* a machine whose engine underwent a complete major overhaul. The seller makes no promises as to any other aspect of the machine, and the buyer takes his chances in regard to everything other than the engine. In this case, for instance, the brake cylinder was faulty. Mr. Frye bears no responsibility for that, and Mr. Rood has appropriately not attempted to hold him liable for it.

perfect sense. Why should a seller be allowed to boldly and explicitly utter a misrepresentation about an item for sale and then escape the consequences of that untruth by hiding behind the phrase "as is"?

Second, § 2316(c)(1), which states that the term "as is" excludes warranties, clearly applies only to implied warranties, and not express warranties. Therefore, Mr. Frye's express warranty lives on, and since Mr. Rood clearly relied on the misrepresentation when purchasing the machine, the only issue which need be decided is whether he breached that warranty.[3]

B. Incomplete Minor Engine Overhaul

Mr. Frye contends no breach occurred. While his counsel could not quite muster up the audacity to assert that the amateurish, piecemeal work Mr. Frye personally performed on the engine was a "complete major engine overhaul," he did attempt to convince the court that this phrase is so vague and meaningless that his client should not be held accountable for selling a machine whose engine was incompletely overhauled in a minor way. That is hogwash.

While many words have expansive meanings, the phrase at issue here does not.

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[3] The defendant appears to believe that express warranties cannot exist at auctions–even when a seller makes an explicit representation regarding the goods being sold. We can find no support for that proposition in case law or the UCC. (*See* Williston on Sales § 17-5, which states that the UCC does not preclude express warranties from arising in the case of auctioned goods.) Nor does the defendant offer authority or even any logical reason why sellers at auctions should be exempt from this provision. He merely cites one 1943 federal case which is not only non-binding, but also not on point because it does not involve a misrepresentation, a breach, or even a warranty. Furthermore, in 1943 the provisions of the UCC at issue here were probably not even a gleam in the drafters' eyes.

"Complete major engine overhaul" is not, as the defendant seems to believe, like a piece of lyric poetry. It is not wide open to interpretation, nor is its meaning entirely subjective. Moreover, even in the ethereal realm of poetic interpretation there are sometimes obvious meanings which cannot be denied: Hamlet really *was* contemplating taking his life, rather than taking an afternoon nap.

It is true that the word "overhaul" is fairly ambiguous, and if Mr. Frye had advertised the engine using only that word, he would probably not have been hauled into court, nor would he have been held liable–at least not by *this* court. It would then have been Mr. Rood's responsibility to inquire exactly what work had been performed. And even the word "major" is a wee bit open to argument. But the word "complete" is not ambiguous, nor is it open to much interpretation. On the contrary, it is very precise; it means, quite simply, that the job has been done totally and entirely, without cutting corners or leaving anything out. There is no upward movement from complete–it's the top of the line.

Mr. Frye did not perform a complete major engine overhaul. In fact, it is a stretch even to call his pitiful attempt an overhaul. John Stroble, an expert called by the plaintiff, described in detail the steps that must be taken to constitute a complete major engine overhaul, and also which of these steps were left out in this case. His testimony in this regard was thorough, convincing, and credible. Moreover, even the defendants' expert testified that the work he saw when he examined the engine was not a complete major engine overhaul.

Nor is Mr. Frye saved by arguing that he honestly believed the work he

performed could be considered a complete major engine overhaul. Even if we believed he were that mechanically disinclined, Mr. Frye would still be liable because, as all sharp tort attorneys know, neither intent nor negligence are elements of an express warranty action. *See* § 2313.

No one forced Mr. Frye to use the phrase "complete major engine overhaul" to describe the job. He chose those words of his own free will, and will be held to their plain meaning.

C. Causation; the Red Herring

As with many cases, this one includes a red herring: the defendant has argued that Mr. Rood has not proven that the work on the engine caused the machine to break down.[4] That may be true, but it is irrelevant. In an action for breach of express warranty, it is only necessary to show that the item purchased was not as the seller promised it would be. The mistruth need not have led to any disastrous consequences.

D. A Final Caveat: Caveat Emptor

Finally, Mr. Frye tries to escape liability by arguing that at auctions, caveat emptor should apply without mercy. Most auctions make the phrase "as is" a condition of sale, and buyers must take heed. However, for the reasons already discussed, all bets are off once the seller has made an express warranty. The phrase "as is" should not give the seller license to lie about the goods with impunity. To imply that caveat emptor means the

[4] Ironically, Mr. Frye attempts to argue that the breakdown was caused by his own error in installing the oil filter backwards.

buyer should beware *of the seller's dishonesty* is certainly repugnant. A sound commercial economy depends upon buyers being able to count on the word of sellers, and to recover if the seller is unworthy of that trust. Sellers using the phrase "as is" receive protection–so long as they keep their mouths shut. Once they make a representation about the goods, however, they will be held to it.

Mr. Frye also tries to make Mr. Rood look naive, unreasonable, and ridiculous by pointing out that he should not expect much because, after all, he purchased a machine which would cost over $100,000 new, for a measly $5000. That argument makes some sense in most situations but holds no water at auctions. As all auction-goers know, the price paid at an auction is no guarantee of anything. Depending on who shows up to bid, one may purchase a gem for peanuts or spend a fortune for a lemon.

O R D E R

AND NOW, this _____ day of November, 2000, for the reasons stated in the foregoing opinion, the court finds in favor of the plaintiffs, Dale and Cindy Rood, and against the defendants, Ted and Linda Frye, in the amount of $5000 plus interest.

BY THE COURT,

Clinton W. Smith, P.J.

cc: Dana Stuchell Jacques, Esq., Law Clerk
Hon. Clinton W. Smith
Michael Leonard, Esq.
William Carlucci, Esq.
Gary Weber, Esq., Lycoming Reporter