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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John Kucharski,

Respondent/Appellant,

v.

Rick Hendrick Chevrolet Limited Partnership and NationsBank,

Appellants/Respondents.

Appeal From Charleston County
Daniel E. Martin, Sr., Circuit Court Judge

Unpublished Opinion No. 2002-UP-584
Heard January 9, 2002 – Filed September 18, 2002

AFFIRMED IN PART AND MODIFIED IN PART

Matthew H. Henrikson, of Barnwell, Whaley, Patterson & Helms, of Charleston, for appellants/respondents.

C. Steven Moskos, of North Charleston, for respondent/appellant.

PER CURIAM: John Kucharski and Rick Hendrick Chevrolet Limited Partnership both appeal a jury verdict arising under the Dealers Act. We affirm in part and modify in part.

FACTS/PROCEDURAL HISTORY

Kucharski went to Rick Hendrick Chevrolet (the dealership) to trade vehicles, primarily to reduce his monthly payment to less than $470, the amount he was then paying. He told the salesman, Dominick Geonellie, that he wanted a payment of around $350 a month without a cosigner. Geonellie said that would not be a problem, but prepared a contract on a Geo Tracker with monthly payments of $464.96. Geonellie explained they had to use the larger payment on the forms because "we've got to be able to show something that you're serious about getting this vehicle." Geonellie nevertheless represented the monthly payment would ultimately be only $350. Kucharski gave Geonellie a check for $1,000 as a down payment, left his Jeep as a trade-in, and signed the forms, but did not believe he had actually purchased the Tracker because the deal was contingent upon financing.

Two days later, Geonellie told Kucharski he was having trouble obtaining financing and a cosigner might be necessary. Kucharski reiterated that he did not want a cosigner and would return the Tracker, but he was told that he could not get his Jeep back because it was being detailed. Thereafter, Geonellie told him that he "was going to need a co-signer and that the Jeep was sold." Kucharski returned the Tracker to the dealership and demanded his Jeep back. Geonellie told Kucharski that he could get the financing done without a cosigner given some more time. Meanwhile, Kucharski continued to drive the Tracker.

The following month, Kucharski began receiving calls from NationsBank requesting information about the cosigner, and demanding payment for the Tracker. Kucharski testified, "I didn't even know I had a contract at this point. I'm still waiting on Mr. Geonellie to get back to me what we're doing about the financing." Unbeknownst to Kucharski, the dealership made the first payment of $423.88, even though Kucharski did not know there was a contract. When Kucharski was finally shown the instrument on which NationsBank claimed he was bound, it had a cosigner who at trial denied ever signing the document or being contacted concerning it. The Tracker was repossessed, and Kucharski was without transportation for six weeks and forced to hitch rides to work with friends.

Kucharski's action against both the dealership and NationsBank alleged actual and constructive fraud, conversion, and violation of the Unfair Trade Practices Act (UTPA) and the Motor Vehicle Dealers Act (Dealers Act). NationsBank was granted a directed verdict on the only action against it, but

remained in the action on its counterclaim for deficiency. The jury awarded Kucharski $16,500 actual damages each for constructive fraud, conversion, and Dealers Act violation, in addition to $50,000 punitive damages on the conversion and Dealers Act causes of action. The trial court denied the dealership's post-trial motions, but required Kucharski to elect his remedy. Kucharski elected the Dealers Act recovery, pursuant to which his actual damages were doubled to $33,000, his punitive damages were reduced to $49,500 (three times actual damages), and he was awarded $13,200 in attorney's fees.

I. Actual Damages Under the Dealers Act

The dealership argues Kucharski cannot claim the total value of the Jeep as the measure of his actual damages because he owed more than it was worth at the time of his loss. Kucharski testified that his vehicle was worth $13,000 and he owed $13,408.34 on it. Thus, the dealership contends the jury verdict for actual damages of $16,500 should be reduced before applying the statutory multiples. We disagree.

The Dealers Act specifically provides a private right of action for damages. S.C. Code Ann. § 56-15-110 (Rev. 1991). However, the measure of actual damages under the Dealers Act is a novel issue in this state. The Act provides that an injured party "shall recover double the actual damages by him sustained, and the cost of suit, including a reasonable attorney's fee." S.C. Code Ann. § 56-15-110 (Rev. 1991). This action is based not on a common law tort or on contract but is a creature of statute. The legislature obviously enacted the Dealers Act because consumers' remedies at common law were deemed to be inadequate. Remedial statutes are to be construed liberally in order to effectuate their purpose. See Spencer v. Barnwell County Hosp., 314 S.C. 405, 408, 444 S.E.2d 538, 540 (Ct. App. 1994) ("In considering a remedial act designed to protect a class of persons or the public at large, the courts liberally construe the act to carry out its purposes."). Remedial statutes "must be interpreted in light of the evil sought to be remedied and in a manner that is consistent with the statute's purpose." Ducworth v. Neely, 319 S.C. 158, 163, 459 S.E.2d 896, 899 (Ct. App. 1995).

In rejecting a similar argument, this court held that recovery "was not contingent on the value of the collateral exceeding the debt," even in a tort action for injury to personal property. Isaac v. Gene's Used Cars, 296 S.C. 280, 283 at n.5, 372 S.E.2d 102, 104 at n.5 (Ct. App. 1988). In Isaac, the plaintiff's car was repossessed and was damaged in a collision while being

towed. Because the debt owed on it exceeded the value of the car at the time of repossession, the dealer argued the right of redemption had no value and the plaintiff suffered no damage from its loss. "The measure of damages is the amount which returns the plaintiff to the position which he enjoyed prior to the negligent act." Id. at 282, 372 S.E.2d at 103. Because the car was a total loss in the wreck, the Isaac court held its previous $2,500 value was the measure of his damages irrespective of his equity in it. We see no reason why the measure of damages should be less for an intentional wrong than one based on mere negligence.

We hold the statute clearly refers to "actual damages" in contradistinction to "punitive damages," not as a limit on the measure of damages. Jeffords v. Florence County, 165 S.C. 15, 20, 162 S.E. 574, 576 (1932) ("Actual damages" as used in statute did not allow offset for amount paid by insurance company. Rather, actual damages "was used in contradistinction to punitive damages.") Section 56-15-110(1) provides for doubling of actual damages, while Section 56-15-110(3) provides for punitive damages capped at triple actual damages, upon a jury's finding of malice.

If there had been no wrongful act, Kucharski would have had a vehicle valued at $13,000 to drive or trade on another car. While it is true he was indebted for a portion of the purchase price, that was a personal debt for which the vehicle was merely security. The indebtedness of the owner does not reduce the total value of the vehicle. There was ample opportunity to return the parties to the status quo as Kucharski attempted numerous times to rescind the contract, only to be thwarted by the dealership. Clearly the dealership was under no obligation to pay off Kucharski's car loan but did so for its own benefit to obtain clear title to the vehicle to resell it. Before the financing contingency of the contract was met, Kucharski's vehicle was resold. Additionally, the dealership received the purchase price of the Tracker from NationsBank. To grant the offset to which the dealership claims to be entitled would confer a benefit which, in the context of the Dealers Act, would be inequitable and subvert the Act's remedial purpose.

In the final analysis, Kucharski was riding when he went to the dealership and ended up walking. We cannot say under these circumstances that the damages were outside the evidence which the jury, as the finder of fact, was allowed to consider. Considering the Dealers Act remedial purpose, the jury was free to conclude that actual damages included the value of the vehicle without any offset allowed for the amount of the debt.

II. Attorney's Fees

Kucharski argues the trial court abused its discretion in awarding attorney's fees based only on a percentage of the actual damages. We agree.

The Dealers Act mandates the recovery of costs, including attorney's fees. S.C. Code Ann. § 56-15-110 (Rev. 1991) (any person injured by reason of anything forbidden in the Act shall recover a reasonable attorney's fee). When determining the reasonableness of attorney's fees under a statute mandating their award, the contract between the client and his counsel does not control the determination of a reasonable hourly rate. Rice v. Multimedia, Inc., 318 S.C. 95, 101, 456 S.E.2d 381, 385 (1995) (affirming a trial court's award of an amount greater than that due the plaintiff's attorney under a contingency fee contract); Columbia (S.C.) Teachers Fed. Credit Union v. Newsome, 303 S.C. 162, 166, 399 S.E.2d 444, 447 (Ct. App. 1990) (affirming an award of attorney's fees based upon an hourly rate even though agreement with client was contingency-based).

The court should consider the following six factors when determining a reasonable attorney's fee: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. Blumberg v. Nealco, Inc., 310 S.C. 492, 494, 427 S.E.2d 659, 660. (1993). "Consideration should be given to all six factors; none of the factors is controlling." Taylor v. Medenica, 331 S.C. 575, 580, 503 S.E.2d 458, 461 (1998); see also Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 384, 377 S.E.2d 296, 297 (1993).

Kucharski entered into a 40% contingency fee arrangement with his attorney. An affidavit presented at the post-trial hearing indicated that based on an hourly schedule, the attorney's fee would be $25,500. Kucharski requested that the court award attorney's fees based on 40% of the entire judgment including punitive damages, which would be $33,000. The court found the affidavit to be reasonable but limited applying the contingency agreement to only actual damages, granting $13,200.

We hold that the trial court abused its discretion in awarding attorney's fees based solely on a percentage of the actual damages with no consideration of the entire damage award and little consideration of the six factors required by our case law. See Blumberg, 310 S.C. at 494, 427 S.E.2d at 660; Taylor at 580, 503 S.E.2d at 461. Applying the contingency

agreement to only actual damages and thereby limiting the attorney's fees to well below that which the trial court otherwise found to be reasonable does not serve the public policies underlying the Dealers Act. These are admittedly difficult cases involving complex issues and requiring substantial amounts of time. In appropriate cases litigants should not be discouraged from pursuing them, and attorneys should not be discouraged from accepting them. We agree with the trial court that the sum indicated by the attorney's affidavit is an appropriate amount, and therefore modify the award of attorney's fees accordingly.

III. Prejudgment Interest

Kucharski argues that because the amount due him was capable of being ascertained and demandable on July 13, 1996, he is entitled to prejudgment interest from that date. We disagree.

Section 34-31-20(A) of the South Carolina Code states the following: "In all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of 8 3/4 percent per annum." S.C. Code Ann. 34-31-20(A) (Rev. 1987) (emphasis added). "The law allows prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable, if the sum is certain or capable of being reduced to certainty." Anderson v. Citizens Bank, 294 S.C. 387, 398, 365 S.E.2d 26, 32 (Ct. App. 1987) overruled on other grounds by Ward v. Dick Dyer & Assocs., 304 S.C. 152, 157, 403 S.E.2d 310, 313 (1991) (UTPA "general activities" test rejected).

> The fact that the sum due is disputed does not render the claim unliquidated for the purposes of an award of prejudgment interest. The proper test for determining whether prejudgment interest may be awarded is whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose.

Babb v. Rothrock, 310 S.C. 350, 353, 426 S.E.2d 789, 791 (1993) (citations omitted).

The measure of recovery to which Kucharski was entitled was not fixed by conditions existing at the time the claim arose. Clearly, some of the damages he testified to, and which were awarded by the jury, occurred after

July 13, 1996, the date on which Kucharski first demanded return of his vehicle. The amount due Kucharski was not a readily ascertainable sum certain at the time the claim arose. We therefore find he was not entitled to prejudgment interest.

To summarize, we affirm the judgment appealed by the dealership, modify Kucharski's attorney's fees to $25,500, and affirm the denial of prejudgment interest.

AFFIRMED IN PART AND MODIFIED IN PART.

CURETON, STILWELL, and SHULER, JJ., concur.