

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 97-CA-2013-MR

JEFFREY ALEXANDER and  
DON A. PISACANO

APPELLANT

V. APPEAL FROM PULASKI CIRCUIT COURT  
HONORABLE DANIEL J. VENTERS, JUDGE  
ACTION NO. 95-CI-0890

S & M MOTORS, INC. D/B/A  
THE LEXUS STORE OF LEXINGTON

APPELLEE

### OPINION AND ORDER AFFIRMING

\*\* \*\* \*

BEFORE: EMBERTON, GARDNER and SCHRODER, JUDGES.

GARDNER, JUDGE. Jeffrey Alexander (Alexander) appeals from a judgment of the Pulaski Circuit court in his action to recover damages from S & M Motors, Inc., d/b/a The Lexus Store of Lexington (The Lexus Store). We affirm.

On November 29, 1993, Alexander purchased a vehicle from The Lexus Store.<sup>1</sup> It appears that the purchase was made based in

---

<sup>1</sup>The trial record has not been designated and as such is not available for our review. As the facts are not in dispute, we have relied on the briefs and pleadings as a source of the

(continued...)

part on representations made by The Lexus Store that the vehicle had never been previously damaged, that it had only one previous owner, and that it was a "Certified Lexus Pre-Owned Car." Approximately one year after purchasing the vehicle, Alexander discovered that the vehicle had sustained heavy damage prior to the date of purchase.

Alexander subsequently filed the instant action against The Lexus Store, alleging that he was defrauded by them. He sought recovery of his purchase price and punitive damages under common law fraud and 15 U.S.C. 2301, and attorney fees under Kentucky's Consumer Protection Act and 15 U.S.C. 2301. The matter proceeded to trial, and Alexander was awarded \$6,000 in compensatory damages and \$75,000 in punitive damages. His motion for an award of attorney fees was denied, and this appeal followed.

Alexander now argues that the trial court committed reversible error in refusing to award a refund of the purchase price of the vehicle. He maintains that the vehicle is worth little more than its salvage value, and that accordingly he was entitled to have the purchase contract rescinded. He also argues that the court erred in failing to instruct the jury on the Magnuson-Moss Act (15 U.S.C. 2301), and that he was entitled to an award of attorney fees under Kentucky's Consumer Protection Act, Kentucky Revised Statute (KRS) 367.010.

As the parties are well aware, Alexander has not designated the trial record, and The Lexus Store has moved to

---

<sup>1</sup>(...continued)  
factual background.

strike Alexander's brief and to dismiss the instant appeal. We have closely studied Alexander's claims of error, and must conclude that a review of the trial record would be necessary to adequately examine the first and second issues raised. On the questions of whether Alexander was entitled to rescission damages and whether the circuit court erred in failing to instruct the jury on the Magnuson-Moss Act, it is impossible to discern whether the circuit court erred without reliance on the facts as they were presented at trial. As to the issue of whether Alexander was entitled to an instruction on the Magnuson-Moss Act, the missing record prevents us from determining if Alexander tendered instructions which addressed the Act, if he objected to the circuit court's instructions, or if he preserved the issue by giving the circuit court an opportunity to correct the alleged error. Without these facts and the related procedural history, we are without a basis for providing further review of these issues. We must conclude that Alexander has not met his burden of proof, and that the missing record supports the actions of the circuit court. See generally Miller v. Commonwealth, Department of Highways, Ky., 487 S.W.2d 931 (1972).

The third issue raised, i.e., whether Alexander was entitled to an award of attorney fees, is subject to our review irrespective of the absent trial record. Alexander argues that Kentucky's Consumer Protection Act, KRS 367.010, et. seq., allows for the injured party to recover reasonable attorney fees, and that the circuit court committed reversible error in failing to award said fees. The Lexus Store counters that such an award lies within

the sound discretion of the trial court, and that no showing has been made that this discretion was abused. We are not persuaded by Alexander's argument and accordingly find no error on this issue.

KRS 367.220(3) addresses the awarding of attorney fees arising from the violation of the Act and states that, "[i]n any action brought by a person under this section, the Court may award, to the prevailing party, in addition to the relief provided in this section, reasonable attorney's fees and costs." For our purposes, the dispositive word is "may," which clearly indicates that the award of attorney's fees arising under this section is discretionary rather than mandatory. See generally Ford Motor Company v. Mayes, Ky. App., 575 S.W.2d 480 (1978). Alexander admits as much, but nevertheless maintains that the circuit court abused its discretion by causing the attorney fee to be paid from the punitive damages award.<sup>2</sup>

We are not persuaded by this argument. The circuit court opined, and we believe properly so, that even though attorney fees were not awarded, Alexander was made whole by virtue of the compensatory damages award, The Lexus Store was punished via the punitive damages award, Alexander's counsel received a reasonable fee, and Alexander received a windfall representing the difference between the punitive damages award and the attorney fee. Alexander's counsel sought \$26,594.50 in attorney fees, and upon examining his offer of proof of this issue, the court found this

---

<sup>2</sup>The trial court did not, of course, order that the attorney fees be paid from the punitive damages award. Rather, Alexander notes that the court's refusal to award attorney fees has the effect of causing the fee to be paid from the award.

amount to be reasonable. We cannot conclude that the court erred in causing this fee to be paid from the punitive damages award. Punitive damages “[s]erve the useful purposes of expressing society’s disapproval of intolerable conduct and deterring such conduct where no other remedy would suffice.” Horton v. Union Light, Heat and Power Co., Ky., 690 S.W.2d 382, 390 (1985), citing Mallor and Roberts, Punitive Damages Toward a Principled Approach, 31 Hastings L.J. 639, 641 (1980). Furthermore, while “[p]unitive damages are awarded as a civil punishment upon the wrongdoer, rather than as indemnity to the injured party . . . it might with much propriety be said that they are allowed by way of remuneration for the aggravated wrong done.” Horton v. Union Light, Heat and Power Co., 690 S.W.2d at 390, quoting Louisville & N.R. Co. v. Roth, 130 Ky. 759, 114 S.W. 264, 266 (1908). Since Alexander’s punitive damages award greatly outweighed the reasonable amount of the attorney fees payable to his counsel, the punitive damages award serves to punish The Lexus Store and also constitutes “remuneration for the aggravated wrong done” as addressed in Horton and Roth. As in Mays, supra, the awarding of attorney’s fees is discretionary. We find no abuse of discretion, and will not tamper with the circuit court’s actions on this issue.

For the foregoing reasons, the motion of The Lexus Store to strike Alexander’s brief is DENIED. Its motion to dismiss Alexander’s appeal is GRANTED as to the first and second issues, and is DENIED as to the third issue. The judgment of the Pulaski Circuit Court is affirmed.

ALL CONCUR.

ENTERED: August 28, 1998

/s/ John A. Gardner  
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

Don A. Pisacano  
Lexington, Kentucky

BRIEF FOR APPELLEE:

Paul C. Gaines III  
Frankfort, Kentucky