RENDERED: AUGUST 7, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000444-MR

MARVIN W. HAEBERLIN — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 06-CI-02352

PRECISION CARS OF LEXINGTON
D/B/A COURTESY PONTIAC ACURA
and WYNNS EXTENDED CARE INSURANCE[1] — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, NICKELL, AND VANMETER, JUDGES.

[1] Our review of the record reveals numerous iterations of the name of this corporate defendant. Although the original complaint and notice of appeal refer to this party as Wynns Extended Care Insurance, we believe the correct name is Wynn's Extended Care, Inc., as evidenced by the pre-printed contract it prepared and which is at issue in this appeal. For the sake of brevity and clarity, we shall hereafter refer to this party as Wynn's.

NICKELL, JUDGE: Marvin W. Haeberlin (Haeberlin), appeals from a summary judgment awarded to Wynn's and a separate order dismissing the amended complaint against Precision Cars of Lexington (Precision). The appeal stems from Precision's sale of a used truck to Haeberlin and his concurrent purchase of a service warranty from Wynn's. We affirm.

Haeberlin admits "the facts in this case do not seem to be in dispute." We agree. In August of 2004, Haeberlin purchased a used 2000 Dodge Dakota pick-up truck for $12,990.00 plus tax and license fees from Precision. He bought the vehicle "as is" and signed a dealer warranty disclaimer. That same day, Haeberlin purchased through Precision an extended six-year or 100,000 mile service contract from Wynn's.

After the purchase, Haeberlin encountered problems with the vehicle. When Haeberlin attempted to utilize the extended warranty to have the problems resolved, things began to go awry. The vehicle was inspected numerous times by various repair facilities and some minor repairs were made in an attempt to alleviate the symptoms Haeberlin described. However, he insisted the problem remained and ultimately believed the vehicle's engine should be replaced at Wynn's expense. Wynn's believed the replacement to be unnecessary and refused to authorize the work. Precision refused Haeberlin's request to take the vehicle back and refund the purchase price.

Haeberlin filed a complaint in Fayette Circuit Court against Precision and Wynn's alleging fraud in violation of the Kentucky Consumer Protection Act[2] and breach of express and implied warranties under the federal Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (MMWA),[3] and seeking joint and several damages from the defendants, including compensatory and punitive damages. The trial court subsequently granted Precision's motion to dismiss the complaint against it as it had disclaimed all warranties to the subject vehicle. With leave of court, the complaint was amended to allege Precision's inaction was the direct cause of Wynn's failure to pay for repairs under the service warranty.

Based on the allegations set forth in the amended complaint and the evidence submitted by the parties, the circuit court granted Wynn's motion for summary judgment on July 19, 2007. The trial court denied Precision's motion for summary judgment on December 10, 2007, but on February 5, 2008, granted Precision's motion to reconsider its order denying summary judgment. This appeal followed.

Our analysis of this appeal is hindered for a variety of reasons. First, in contravention of CR[4] 76.12(4)(c)(iv) and (v), Haeberlin does not cite to us

[2] Codified at Kentucky Revised Statutes (KRS) Chapter 367.

[3] Codified at 15 U.S.C. § 2301 *et seq.*

[4] Kentucky Rules of Civil Procedure.

within the record the factual basis supporting his legal argument. Nor does his brief include "a statement with reference to the record showing whether the issue was preserved for review and, if so, in what manner." Further, Haeberlin's brief is devoid of citation to the record supporting his summary of the factual evidence presented. Although noncompliance with CR 76.12 is not automatically fatal, we would be well within our discretion to strike Haeberlin's brief for its omissions and noncompliance. *Elwell v. Stone,* 799 S.W.2d 46 (Ky. 1990). While we might be able to overlook these deficiencies in Haeberlin's brief, they constitute just one of a multitude of deficiencies we have encountered while attempting to review this matter.

Next, the record on appeal does not contain recordings or transcripts from some of the numerous hearings held by the trial court without which we are unable to verify many of the assertions made by both parties. The absence of these portions of the record also makes some of the trial court's rulings difficult to decipher. For example, the parties reference a motion to dismiss the amended complaint which appears nowhere in the written record nor is it discussed at any of the hearings designated to be included in the record on appeal. The sole motion to dismiss which does appear in the record dealt with the initial complaint—a motion which was granted and is not in issue in the instant appeal. It is the responsibility of an appellant to ensure the record on appeal is complete and contains all of the

evidence needed to facilitate appellate review, and in the absence of a complete record, we must assume the omitted portions of the record support the rulings of the trial court. *Commonwealth v. Thompson,* 697 S.W.2d 143, 145 (Ky. 1985). The less than complete record is yet another roadblock to appellate review.

Additionally, in our attempt to review the limited record on appeal, we note that one of the trial court's orders appealed from is internally inconsistent, perhaps the result of confusion generated by the parties. Specifically, the February 5, 2008, order initially purports to grant Precision's "Motion to Dismiss the Amended Complaint." However, we note that no such motion appears in the record. Further, the final paragraph of the order indicates Precision's "Motion for Summary Judgment is hereby sustained." The parties appear to use the terms "motion to dismiss" and "motion for summary judgment" synonymously in their written pleadings before the trial court. Although the result of a dismissal and a summary judgment may be the same—litigation is terminated as to a particular party or issue—the applicable standards to be employed by a trial court in making its determination are different, as are the standards on appellate review. The trial court's unexplained use of both of these terms introduces another level of confusion and further hampers our review. We are unable to square this and other inconsistencies based on the record before us.

The combination of the deficient briefs, incomplete record, and inconsistent usage of important legal terminology forecloses our ability to give a full and meaningful review. However, from what record we have before us we must conclude the trial court did not err. First, Haeberlin admits the facts are undisputed, and thus, the trial court's factual findings must be taken as correct. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). Next, Haeberlin did not produce evidence that Precision's warranty disclaimers were invalidated by his purchase of the service contract from Wynn's. Contrary to his argument, Precision was not a party to the service contract, and thus is not subject to the restrictions on disclaimers as set forth under Section 2308(a) of the MMWA.[5] Precision owed no duty to Haeberlin or Wynn's whatsoever under the extended warranty agreement. Thus, Haeberlin's claims against Precision must fail.

In addition, Haeberlin did not offer proof of his compliance with the clearly defined requirements under the service contract, including maintaining adequate records and receipts verifying routine maintenance had been performed on the vehicle, and notifying Wynn's prior to beginning any repair for which it might be liable under the contract. In light of these undisputed facts, it is clear

[5] That section of the MMWA prohibits dealers from selling vehicles "AS-IS" and disclaiming all warranties if the dealer provides the consumer a written warranty or "at the time of sale, or within 90 days thereafter . . . enters into a service contract with the consumer . . . ."

Haeberlin did not uphold his end of the bargain, Wynn's was not obligated to perform, and the trial court correctly so found.

We are unable to discern from the record any set of circumstances under which Haeberlin could have prevailed against Precision or Wynn's. Therefore, we cannot hold the trial court erred in terminating the proceedings below, whether by way of summary judgment, dismissal, or some combination thereof. *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985). Therefore, for the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Sam H. Whitehead
Lexington, Kentucky

BRIEF FOR APPELLEE, PRECISION CARS OF LEXINGTON:

Benjamin P. Hicks
Lexington, Kentucky

BRIEF FOR APPELLEE, WYNN'S EXTENDED CAR INSURANCE:

Dean T. Wellman
Lexington, Kentucky