CLERK
SUPREME COURT OF VIRGINIA
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APR 7 1978
RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 77-1357

ROBERT CHRISTOPHER HENRY,
Appellant,

v.

R. K. CHEVROLET,
Appellee.

APPENDIX

Albert L. Fary, Jr.
218 London Boulevard
Portsmouth, Virginia 23704
Counsel for Appellant

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VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

ROBERT CHRISTOPHER HENRY,

Plaintiff

vs. MOTION FOR JUDGMENT

R K CHEVROLET,

SERVE ON: Richard H. Kline, President
2661 Virginia Beach Boulevard
Virginia Beach, Virginia,

Defendant

Now comes the plaintiff, Robert Christopher Henry, by counsel, and as his Motion for Judgment, states as follows:

1. That this Honorable Court is vested with jurisdiction in this matter by Chapter 4.1 of Section 59.1 of the 1950 Code of Virginia, as amended.

2. That on the 6th day of February, 1976, the defendant was a Virginia corporation engaged in that principal business of retailing new and used automobiles.

3. That on the 6th day of February, 1976, the plaintiff purchased two Chevrolet Vans from the defendant, said vans being represented to the plaintiff as being 1972 models.

4. That upon attempting to title said vans, the plaintiff discovered that they were in fact 1971 models.

5. That the 1971 Vans are worth less than a comparable 1972 Van.

6. The defendant and his agents misrepresented their products in the sales documents presented to the plaintiff, causing him additional expense, loss of time, loss of earnings and attorney's fees.

WHEREFORE, the plaintiff, Robert Christopher Henry, moves the Honorable Judge of the above named Court for a judgment and award of execution against the defendant herein in the amount of One Thousand Two Hundred Dollars ($1,200.00), plus the costs of

RT L. FARY, JR.
ORNEY AT LAW
TSMOUTH, VA.

these proceedings and interest from February 6, 1976, and reasonable attorney's fees.

ROBERT CHRISTOPHER HENRY

By_____
Counsel

Albert L. Fary, Jr., p.q.
218 London Boulevard
Portsmouth, Virginia 23704

filed July 30 1976

RT L. FARY, JR.
IRNEY AT LAW
TSMOUTH, VA.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

ROBERT CHRISTOPHER HENRY,
Plaintiff,

v.

AT LAW
NO. L-3456

R.K. CHEVROLET,
Defendant.

ANSWER AND GROUNDS FOR DEFENSE

Defendant, as and for its Answer and Grounds of Defense, respectfully states as follows:

1. The allegations in Paragraph 1 are denied.

2. The allegations in Paragraph 2 are admitted.

3. The allegations in Paragraph 3 are admitted, save and except that it is expressly denied that any representations whatsoever were made to Plaintiff respecting the subject vehicles.

4. The allegations in Paragraphs 4, 5 and 6 are denied, and strict proof thereof is called for.

WHEREFORE, Defendant asks that Plaintiff's Motion for Judgment be dismissed, with costs to Defendant.

R.K. CHEVROLET

BY _____
Counsel

I hereby certify that a true copy of the foregoing was mailed to Counsel of Record this 17th. day of August, 1976.

_____

AW OFFICES
'S & BOWERMAN
PLAZA SQUARE
IA BEACH BOULEVARD
ACH, VIRGINIA 23452
TELEPHONE
04 486 3100

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

ROBERT CHRISTOPHER HENRY,

Plaintiff,

v.

AT LAW
NO. L-3456

R.K. CHEVROLET,

Defendant.

INTERROGATORIES

Defendant requires Plaintiff to answer, under oath, within 21 days hereof, the below Interrogatories, pursuant to Rule4:8, to produce for inspection and copying, the below designated documents in the office of M.E. Bowerman, Suite 104-Plaza Square, 3284 Virginia Beach Boulevard, Virginia Beach, Virginia, pursuant to Rule 4:9, and to admit the truth of the statements, opinions of fact, and applications of law to fact and the genuineness of the documents set forth below, pursuant to Rule 4:11:

1. With respect to your allegations in Paragraph 3 of your Motion for Judgment state, in detail, the exact terms in which the subject vehicles were offered for sale to you and by whom. Futher state the exact terms of the alleged representation of the Model year of said vehicle, the date, time and place of such representation and by whom it was made.

2. With respect to the allegations in Paragraph 4, state the date, time, place and exact circumstances of your learning that the van were 1971 models.

3. With respect to Paragraph 5 state what you exert to the the worth or value of the 1971 vans and the worth or value of a comparable 1972 van, and the exact difference between such values. State the source relied upon by you in arriving at these

LAW OFFICES
ITS & BOWERMAN
03 PLAZA SQUARE
NIA BEACH BOULEVARD
EACH, VIRGINIA 23452
TELEPHONE
804 486 1100

values.

4. With respect to Paragraph 6, describe in detail the documents relied on by you, produce said documents as aforesaid, or, in the alternative, attach copies of same to your Answers hereto, and state in exact detail, a complete itemization of the additional expense, loss of time, loss of earning, and attorney's fees claimed by you and produce as aforesaid, or in lieu thereof attach copies hereto of all receipts, records and other documents showing such damages.

5. State, for the period from February 6, 1976 to date, the exact nature of your employment, the wages or other earnings therefrom and the specific dates and times for which you claim loss of earnings.

6. State the names and addresses of all witnesses you intend to call upon trial of this matter and give a detailed resume of their proposed testimony.

7. Produce as aforesaid, or in lieu thereof, attach copies hereto, all documents you intend to introduce upon trial of this matter.

These Interrogatories shall, as provided, be deemed by you as continuing, so as to require supplemental answers by you, if additional information becomes available to you up to the date of trial.

R.K. CHEVROLET

BY_____
Counsel

I hereby certify that a true copy of the foregoing was mailed to Counsel of Record this 17th. day of August, 1976.

LAW OFFICES
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804 - 486-3100

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

ROBERT CHRISTOPHER HENRY,

Plaintiff

vs. AT LAW NO. L-3456

R.K. CHEVROLET,

Defendant

ANSWER TO INTERROGATORIES

NOW COMES the plaintiff, Robert Christopher Henry, under oath, for his answer to interrogatories propounded by the defendant, R.K. Chevrolet, states as follows:

1. The vehicles were offered to me for sale as 1972 Chevy G-30 Vans sold as is by Mr. Bruce Thompson, an employee of R.K. Chevrolet. They were offered to me on the 6th day of February, 1976, at approximately 6:30 P.M. at the premises of R.K. Chevrolet on Virginia Beach Boulevard, Virginia Beach, Virginia, by Mr. Bruce Thompson.

2. I learned that the vehicles were 1971 instead of 1972 when I took the title to the Division of Motor Vehicles on Mercury Boulevard in Hampton for a change of ownership.

3. Due to the calculations that I made before purchasing said vehicles, I determined that a 1972 van to be worth approximately $1500.00 and I find that a 1971 van in approximately the same condition to be worth about $1100.00. This was determined from checking newspapers, talking with various used car people and consulting the available publications.

4. Defendant's form (1) "VADA Form 116 3/73", (2) Installment Sales Contract L 307, payable to the order of First Peninsula Bank and Trust Company (3) Attorney's fees in the amount of $350.00.

5. Thus far all the time that I have spent has been during my off time and the only loss wages I will have is when I attend Court for this matter.

6. I intend to call Richard Kline, 2661 Virginia Beach Boulevard, Virginia Beach, Virginia, who has indicated that there was a difference

.. FARY, JR.
EY AT LAW
OUTH, VA.

of $450.00 each, between the 1972 Van and the 1971 Van; Bruce Thompson, 2661 Virginia Beach Boulevard, Virginia Beach, Virginia, who I expect to testify that he represented the vehicles to be 1972 Vans; and Carl Sexton, 5616 Darby Close, Portsmouth, Virginia, who I expect to testify as to his opinion of the difference in value of the 1971 Van and a 1972 Van.

7. The Defendant already has in their possession all documents that I intend to introduce upon trial of this matter.

ROBERT CHRISTOPHER HENRY

_____

STATE OF VIRGINIA

City of Portsmouth, to-wit:

This day personally appeared before me, _____ a Notary Public in and for the City and State aforesaid, Robert Christopher Henry, who being duly sworn, made oath that he has read the foregoing Answer to Interrogatories and knows the content thereof and that the same is true and correct to the best of his knowledge, information and belief.

Given under my hand this ___ day of _____, 19____.

My commission expires: _____.

_____
Notary Public

filed 10/23/76

ARY, JR.
T LAW
H, VA.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

ROBERT CHRISTOPHER HENRY,

Plaintiff

vs. AT LAW NO. L-3456

R.K. CHEVROLET,

Defendant

REQUEST FOR ADMISSIONS

Pursuant to Rule 4:11, Supreme Court of Appeals, Rules of Court, the plaintiff, Robert Christopher Henry, by counsel, respectfully requests the defendant, R.K. Chevrolet, under oath, to either admit or deny the following:

1. That the agent for R.K. Chevrolet, Mr. Bruce Thompson, and others, represented the vehicle sold to plaintiff as a 1972 Van.

ROBERT CHRISTOPHER HENRY

BY_____
Counsel

Albert L. Fary,
Attorney at Law
218 London Boulevard
Portsmouth, Virginia 23704

I certify that a true copy of the foreging pleading was mailed to the attorney for the defendant, Michael E. Bowerman, Suite 104, Plaza Square, 3284 Virginia Beach Boulevard, Virginia Beach, Virginia 23452, this 21 day of October, 1976.

_____

Y, JR.
.AW
VA.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

ROBERT CHRISTOPHER HENRY,

Plaintiff,

v.

AT LAW
NO. L-3456

R.K. CHEVROLET,

Defendant.

ANSWER TO REQUEST FOR ADMISSIONS

Richard Kline, President and Agent for R.K. Chevrolet, being first duly sworn, respectfully states as follows:

1. The statement as to which Plaintiff requests an admission is denied.

Richard Kline, President and
Agent for R.K. Chevrolet

STATE OF VIRGINIA
CITY OF VIRGINIA BEACH, to-wit

Subscribed and sworn to before me this 2nd day of November, 1976 by Richard Kline.

2 9 79
My Com. Exp.

Notary Public

I hereby certify that a true copy of the foregoing was was mailed to Counsel of Record this 5th day of November, 1976.

LAW OFFICES
TS & BOWERMAN
04 PLAZA SQUARE
NIA BEACH BOULEVARD
EACH, VIRGINIA 23452
TELEPHONE
804 486 3100

Commonwealth of Virginia

ROBERT S. WAHAB, JR.
PHILIP L. RUSSO
AUSTIN E. OWEN
HENRY L. LAM
GEORGE W. VAKOS
RESIDENT JUDGES
CIRCUIT COURT
CITY OF VIRGINIA BEACH
PRINCESS ANNE
GINIA BEACH, VIRGINIA 23456

SECOND JUDICIAL CIRCUIT

N. WESCOTT JACOB
RESIDENT JUDGE
CIRCUIT COURTS
ACCOMACK COUNTY
NORTHAMPTON COUNTY
ONANCOCK, VIRGINIA 23417

March 14, 1977

Albert L. Fary, Jr., Esquire
218 London Boulevard
Portsmouth, Virginia 23704

Michael E. Bowerman, Esquire
104 Plaza Square
3284 Virginia Beach Boulevard
Virginia Beach, Virginia 23452

Re: Henry v. R. K. Chevrolet
Law No. L-3456

Gentlemen:

You will recall that this matter came on for trial on March 10, 1977, at which time, before commencement of trial, Mr. Bowerman orally demurred to the Motion for Judgment on behalf of the defendant. Mr. Fary on behalf of the plaintiff waived any objection to the form of the Demurrer and to its timeliness.

Mr. Fary emphasized that he desired to state an action and proceed upon an action only under Chapter 4.1 of Section 59.1 of the 1950 Code of Virginia, as amended. More specifically he relies upon Section 59.1-68.3 of the Code and alleges loss as the result of a violation of Section 18.2-216 of the Code.

The Court, while of the opinion that the Motion for Judgment might state a cause of action, was and is of the opinion that it does not state a cause of action under the referenced Code sections, and therefore sustained the Demurrer.

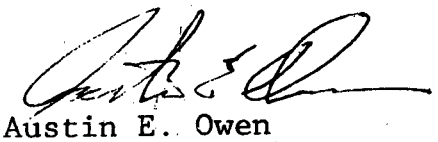
The Motion for Judgment and the Answers to Interrogatories disclose that this action is based solely on an alleged oral representation alleged to have been made by a salesman for defendant to the plaintiff at the time of negotiations leading to the sale. The alleged oral representation is that the 2 vehicles were 1972 models whereas plaintiff contends they were in fact 1971 models. The oral representation is possibly supported by the documents prepared incident to the sale.

Code Section 18.2-216 provides in pertinent part that "any... corporation...who, with intent to sell...merchandise, ...directly or indirectly...to the public...makes..., or causes directly or indirectly to be made, published, disseminated, circulated or placed before the public, in a newspaper...or in any other way, an advertisement of any sort regarding merchandise...so offered to the public, which advertisement contains any promise, assertion, representation or statement of fact which is untrue...or uses any other method, device or practice which is fraudulent, deceptive or misleading to induce the public to enter into any obligation, shall be guilty of a Class 1 misdemeanor." The section then goes on to define "untrue, deceptive and misleading" as including (1) the advertising...; and (2) the use of any writing or document which appears to be but is not a negotiable instrument.

The Court is of the opinion that the alleged oral statement from defendant's salesman to plaintiff (and the documents relating solely to that sale) is clearly not an "advertisement" within the meaning of Section 18.2-216, particularly considered in the light of the strict construction to be given to any criminal statute. In the Court's opinion the additional language "or uses any other method, device or practice which is fraudulent, deceptive or misleading to induce the public to enter into any obligation" refers, as does the "advertisement" to some "method, device or practice" disseminated to the 'public'; and does not encompass the oral representation made solely to plaintiff in the present instance.

Mr. Fary is requested to draft a decree sustaining the Demurrer for the reasons set forth in this letter opinion. The plaintiff having expressed the desire to proceed, at this time, solely upon the basis of the statutory action (including the right to recover attorneys fees), and indicating no desire to amend, the order will not grant leave to amend and will direct that the Motion for Judgment be dismissed.

Yours very truly,



Austin E. Owen

pl

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH
on the 27th day of May, 1977

ROBERT CHRISTOPHER HENRY,

Plaintiff

vs. AT LAW NO. L-3456

R.K. Chevrolet,

Defendant

ORDER

This matter came on for trial on March 10, 1977, at which time the defendant, R.K. Chevrolet, demurred to the plaintiff's motion for judgment as not being sufficient at law, plaintiff having waived objection to the lateness of said demurrer.

After hearing the evidence and for good cause shown, it is hereby ADJUDGED, ORDERED and DECREED that the plaintiff's motion for judgment does not state a cause of action under Code Section 59.1-68.3 of the 1950 Code of Virginia, as amended, and the related Section 18.2-216 of the Code of Virginia, 1950, as amended.

It is the opinion of the Court that the oral representations made by the defendant do not come under the specified Code Section and that it was made solely to the plaintiff, and therefore not "desseminated to the public".

It is further ORDERED that the Motion for Judgment be dismissed and final judgment entered in favor of the defendant.

Enter:

Judge

p.q.

p.d.

12

.RY, JR.
T LAW
H, VA.

A Copy Teste: John V. Fentress, Clerk
By Doris S. Hale, D.C.

ASSIGNMENTS OF ERROR

1. The Court erred in holding that an oral representation does not come under 18.2-216 of the 1950 Code of Virginia, as amended.

2. The Court erred in holding that the corporation's representation to an individual buyer does not amount to, directly or indirectly, offering, inducing, or placing before the public in any way an advertisement of any sort regarding merchandise or anything so offered to the public containing any promise or statement of fact which is untrue or misleading to induce the public to enter into any obligation.

6/3/77

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

ROBERT CHRISTOPHER HENRY,

Plaintiff

vs. AT LAW NO. L-3456

R. K. CHEVROLET,

Defendant

NOTICE OF APPEAL

Pursuant to the provisions of Rule 5:6, Robert Christopher Henry, plaintiff in the above action, hereby gives Notice of an Appeal from the final Order herein entered on the 27th day of May, 1977.

There will be no transcript to be filed, but a statement of facts will be filed.

ROBERT CHRISTOPHER HENRY

By_____
Of Counsel

Albert L. Fary, Jr.
218 London Boulevard
Portsmouth, Virginia 23704

I hereby certify that on the ___ day of May, 1977, I mailed a true copy of the foregoing Notice of Appeal to Michael E. Bowerman, counsel for the defendant.

_____

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

ROBERT CHRISTOPHER HENRY, :

Plaintiff :

vs. : AT LAW NO. L-3456

R. K. CHEVROLET, :

Defendant :

STATEMENT OF FACTS

A demurrer to the Motion for Judgment on behalf of the defendant was sustained by the Court on the basis that Section 59.1-68.3 and Section 18.2-216 of the 1950 Code of Virginia as amended, was not applicable to the facts pertaining to the case at bar. The plaintiff had sought to purchase two Chevrolet Vans from the defendant which had orally been represented to him to be 1972 model Chevrolet Vans. The plaintiff's attorney advised the Court that he would offer evidence that the plaintiff had obtained a loan from the First Peninsula Bank on the basis that the vans were 1972 models; that the cashier's check from First Peninsula Bank payable jointly to plaintiff and defendant, contained a restrictive endorsement wherein a lien was to be placed on a specified 1972 model van; that the documents prepared by R. K. Chevrolet, and signed by the plaintiff, indicated that they were 1972 model Chevrolet Vans; that the titles reflected that the vans in fact were 1971 models; and that, R. K. Chevrolet endorsed and cashed the check containing the endorsement reference to a 1972 model van.

Reference is made to the letter of the Honorable Austin E. Owen, Judge of the Circuit Court of the City of Virginia Beach, dated March 14, 1977, and is incorporated herein by reference thereto for further details and incidences of this case.

Defendant notes his objections to this statement of facts and relies on statement submitted by Defendant on July 29, 1977.

APPROVED: 8/8/77

~~ENTER~~:

JUDGE

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 24th *day of* February, 1978.

Robert Christopher Henry, Appellant,

against Record No. 771357
Circuit Court No. L-3456

R. K. Chevrolet, Appellee.

From the Circuit Court of the City of Virginia Beach

Upon the petition of Robert Christopher Henry an appeal is awarded him from a judgment rendered by the Circuit Court of the City of Virginia Beach on the 27th day of May, 1977, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and R. K. Chevrolet was defendant; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said court below in the penalty of $500, with condition as the law directs.

A Copy,

Teste:

Allen L. Lucy

Clerk