NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

DARWIN ORTIZ,

Plaintiff/Appellee,

vs.

CAR GALLERY,

Defendant/Appellant.

Case No. 119,645

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE CATHERINE M. BURTON, TRIAL JUDGE

AFFIRMED

Michael P. Rogalin
MICHAEL PAUL ROGALIN,
LAWYER, P.C.
Oklahoma City, Oklahoma

For Defendant/Appellant

OPINION BY JANE P. WISEMAN, PRESIDING JUDGE:

Defendant Car Gallery appeals a Court Order Determining Judgment in Small Claims Action entered against it by the District Court of Oklahoma County, Small Claims Division, in favor of Plaintiff Darwin Ortiz.

BACKGROUND

Ortiz filed this action against Car Gallery in small claims court for $10,000 alleging Car Gallery sold him "a defective car."

The small claims court conducted several hearings over several days.[1] At a December 2, 2020 hearing, Ortiz testified that in October 2020, he was in the market to buy an automobile for his brother. He and his brother looked at a Chrysler 300 at Car Gallery on October 12, 2020. Although they wanted to test drive the vehicle, they could not because the vehicle had a flat tire. On October 14, 2020, Ortiz called Car Gallery and an employee told him someone was purchasing the Chrysler 300. Ortiz and his brother visited Car Gallery anyway and discovered no one had purchased the Chrysler 300. He and his brother test drove the vehicle but only for a few miles. Ortiz testified they were unable to have anyone examine the car because Car Gallery did not give them sufficient time. Car Gallery did not dispute Ortiz's testimony.

Ortiz purchased the 2012 Chrysler 300 for $9,000 from Car Gallery on October 14, 2020. As part of the purchase, Ortiz executed a Retail Purchase Agreement and a Test Drive Agreement. The Retail Purchase Agreement provided in part:

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[1] The facts are taken from the small claims court's Court Order Determining Judgment in Small Claims Action and the Transcript of Proceedings dated March 31, 2021.

> The above described motor vehicle is being sold "as is" and "with all faults" and:
>
> The selling dealer expressly disclaims all warranties, expressed or implied, including any implied warranties of merchantability or fitness for a particular purpose . . . .

Ortiz testified that he drove the Chrysler 300 to his apartment after purchasing the vehicle. Ortiz or his brother moved the vehicle to wash it. The next morning, less than 20 hours after purchase, Ortiz's brother tried to start the car. Smoke started billowing out from under the hood and the engine caught on fire. Ortiz tried to unlatch the car's hood but could not, and he then sought help from a neighbor and called the City of Moore Fire Department to extinguish the fire. Ortiz testified that the vehicle was a total loss. He also testified the salesman at Car Gallery told him "the vehicle was well-inspected, that it had no issues and it was good to go" when he was looking at the vehicle.[2]

Mohamed Hegazy from Car Gallery testified that the vehicle was fine when Ortiz left the Car Gallery lot with the car and that "Ortiz bought the Chrysler 300 as is/no warranty."

The small claims court continued the hearing to allow the parties to have a disinterested party inspect the vehicle and determine the cause of the fire.

[2] Transcript, March 31, 2021, p. 15.

The parties appeared for a second hearing on January 6, 2021. Car Gallery appeared with an attorney, Michael Rogalin, and Ortiz appeared *pro se*. Ortiz stated he had the Chrysler 300 inspected at Bob Howard Chrysler Jeep Dodge and submitted a report from them regarding the inspection. According to the report, the person inspecting the car wrote:

> Cust states veh has engine fire and wants to know what caused this issue . . . Inspected engine bay for possible causes for engine fire but the high heat from fire makes it impossible to find the point of ignition. The engine compartment is badly burnt and the intake manifold where the fuel rails and injection system. All the wiring shielding is burnt off and all other items are burned beyond recognition. Was not able to find ignition source.

Ortiz said Bob Howard was unable to find the ignition source or the cause of the fire because there was too much fire damage. Car Gallery objected to the report because it was not given the opportunity to choose the place where the car was inspected. The small claims court continued the hearing until February 11, 2021, so the parties could have the car inspected at an agreed disinterested place.

At the third hearing on February 11, 2021, the small claims court heard that Ortiz had contacted Car Gallery about taking the vehicle to a neutral place for an inspection. However, the parties were unable to agree on a time. The small claims court continued the hearing to March 31, 2021, and instructed the parties to have the vehicle towed to Bob Moore Chrysler Jeep Dodge Ram Service Center to be

available for inspection by an adjuster for IAT Insurance Group, Car Gallery's insurance carrier.

At the March 31, 2021 hearing, the court was advised that the parties had not reached an agreement as to meeting up for an inspection of the car. Rather than rescheduling, the small claims court decided to complete the hearing. Ortiz introduced the document from Bob Howard Chrysler Jeep Dodge and a photograph of the burned vehicle.

Car Gallery introduced the Retail Purchase Agreement and the Test Drive Agreement between Ortiz and Car Gallery. The Retail Purchase Agreement contained the "as is" and "with all faults" language previously referred to. Car Gallery also introduced a report from Gabriel Alexander of U.S. Forensic. Car Gallery's insurance company hired U.S. Forensic to inspect the Chrysler 300 and determine the origin and cause of the fire. After examining the Chrysler 300, Mr. Alexander concluded "the cause of the fire to be intentional." He noted that the "burn pattern was directly centered on top of the engine." He also noted that the "engine block was cracked and split open on the passenger side of the engine." Based on the examination of the cracked engine block, Mr. Alexander concluded the "engine was not functional at the time of the fire and that the engine suffered catastrophic internal engine failure that caused the engine block crack."

Attached to the U.S. Forensic report was a copy of the City of Moore Fire Department Fire Report. The Fire Report concluded no human factors contributed to the fire, that the heat source was undetermined, and that the cause of ignition was "[u]nintentional."

After considering the evidence and arguments presented by the parties, the small claims court entered judgment in favor of Ortiz and against Car Gallery in the amount of $9,000 for the cost of the car and $269 for costs and service fees.

The court explained the issues with Mr. Alexander's report. First, Mr. Alexander's credentials did not show he had experience, training, or education in fire analysis. And the Bob Howard Service report concluded it was impossible to find the point of ignition. The court opined, "It seems a far-stretch for Defendant's analyst to conclude the fire as intentional when the Fire Department and Bob Howard Service do not report this in their analyses."

The court also noted that Ortiz said on several occasions that the Car Gallery salesman told Ortiz "that this car ran well and was a good car." Car Gallery did not dispute this testimony. Instead, Car Gallery relied on the "as is" language contained in the Retail Purchase Agreement. The trial court elaborated:

> However, when, in less than 24-hours of purchase, a "good car that runs well" caught on fire in the driveway of the Plaintiff, there is no conclusion but that Defendant sold victim a car that he sponsored as a good car that was, in fact, dangerous and not good at all. This changes

> the Defendant's Disclaimer of liability. He did not refute what Plaintiff said he was told.

Car Gallery appeals the judgment in Ortiz's favor.

STANDARD OF REVIEW

This Court's standard of review with respect to determinations of fact in a small claims proceeding is that "'[i]f there is any evidence tending to support the findings and judgment of the trial court . . ., the findings and judgment will not be disturbed, even if the record might support a conclusion different from that reached at nisi prius.'" *Leding v. Furr*, 2012 OK CIV APP 61, ¶ 4, 287 P.3d 394 (quoting *Sides v. John Cordes, Inc.*, 1999 OK 36, ¶ 16, 981 P.2d 301). "'The credibility of witnesses and the effect of and weight given to their testimony, as well as the resolution of conflicting or inconsistent testimony, are questions of fact to be determined by the trier.'" *Id.*

ANALYSIS

Car Gallery argues the parties entered into a written agreement, the Retail Purchase Agreement, and any oral representations made prior to execution of the Agreement are not considered pursuant to 15 O.S.2011 § 137.[3] Car Gallery asserts

[3] Title 15 O.S.2011 § 137 provides:

> The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter, which preceded or accompanied the execution of the instrument.

the Retail Purchase Agreement provided the vehicle was sold "as is," which superseded any prior oral statements that the vehicle was a good car. In addition, Car Gallery says Ortiz stated he was fully insured and "[i]t would be just to have him collect from his insurance . . . ."

Ortiz did not file an answer brief on appeal, and the case before us stands submitted on Car Gallery's brief only. When a party fails to file an answer brief and the failure to file a brief is not excused, then "we are under no obligation to search the record for some theory to sustain the trial court's judgment." *Williams & Kelley Architects v. Independent Sch. Dist. No. 1, Okmulgee County*, 1994 OK CIV APP 113, ¶ 8, 885 P.2d 691. However, reversal is never automatic for failure to file an answer brief. *Hamid v. Sew Original*, 1982 OK 46, ¶ 7, 645 P.2d 496.

Car Gallery focuses its argument on the "as is" and "with all faults" language in the Retail Purchase Agreement. The Uniform Commercial Code recognizes the use of the terms "as is" and "with all faults." 12A O.S.2011 § 2-316(3).[4] "The phrases 'as is' and 'with all faults' are commonly used by sellers of

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[4] Title 12A O.S.2011 § 2-316(3) provides in part:

> (3) Notwithstanding subsection (2)
>
> (a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty . . . .

used automobiles, and those phrases are commonly understood to relieve the seller of any liability on a claim for breach of warranty due to defects in a motor vehicle." *Bundren v. Car Connection, Inc.*, 1998 OK CIV APP 119, ¶ 10, 963 P.2d 634. However, "[a]n effective disclaimer of warranties does not necessarily prevent recovery of damages caused by the seller's fraudulent or other deceptive conduct." *Id.* ¶ 11.

In *Murray v. D&J Motor Co., Inc.*, 1998 OK CIV APP 69, 958 P.2d 823, this Court examined the "as is" and "with all faults" disclaimers in a factually similar case. In *Murray*, the plaintiff purchased a used vehicle after being assured that there was nothing wrong with it. *Id.* ¶ 7. The vehicle began having problems within a day of the plaintiff's purchase. *Id.* ¶ 5. In examining the "as is" and "with all faults" disclaimers, the *Murray* Court stated:

> The "as is" and "with all faults" disclaimers are possibly effective to disclaim *implied warranties* unless circumstances indicate otherwise. However, the "circumstances" mentioned in the Code are not defined. Moreover, a general disclaimer of warranties may be ineffective if unreasonable. 12A O.S.1991, § 2-316(1). This is consistent with Comment 4 of 12A O.S.1991, § 2-313 providing:
>
> > In view of the principle that the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell, the policy is adopted of those cases which refuse except in unusual circumstances to recognize a material deletion of the seller's obligation. Thus, a contract is normally a contract for a sale of something

> describable and described. A clause generally disclaiming 'all warranties, express or implied' cannot reduce the seller's obligation with respect to such description and therefore cannot be given literal effect under section 2-316.

Id. ¶ 27 (footnote omitted).

The *Murray* Court concluded:

> This Court holds that among the circumstances that could render a purported "as is" or "with all faults" disclaimer unreasonable and ineffective are fraudulent representations or misrepresentations concerning the condition, value, quality, characteristics or fitness of the goods sold that are relied upon by the Buyer to the Buyer's detriment. Therefore, if the disclaimer of the implied warranties of fitness for a particular purpose and merchantability are tainted with, or by, such misrepresentations or false representations, that then is a "circumstance" that will preclude an effective disclaimer. To hold otherwise would allow a seller to profit from his fraud and to be effectively granted a license to mislead or conceal facts.

Id. ¶ 28.

The small claims court commented on the evidence presented over the course of several hearings, noting that Ortiz repeatedly testified that Car Gallery employees told him that the vehicle "ran well and was a good car." Car Gallery did not dispute these remarks or the characterization of the fitness of the vehicle. The small claims court also noted that the vehicle caught fire in Ortiz's driveway less than 24 hours after the purchase and "there is no conclusion but that [Car

Gallery] sold victim a car that [Car Gallery] sponsored as a good car that was, in fact, dangerous and not good at all."

The court also focused on the reports introduced by the parties. The record included a report from Bob Howard Chrysler Jeep Dodge stating they were unable to find an ignition source due to the high heat from the fire and a report from the Moore Fire Department, attached to the report introduced by Car Gallery, which stated that a human factor did not contribute to the fire, the heat source was undetermined, and the cause of ignition was unintentional.

Car Gallery introduced a report from U.S. Forensic, hired by Car Gallery's insurance company. The report indicated the writer, Gabriel Alexander, spoke with a representative of Car Gallery but did not speak with Ortiz before preparing the report. Mr. Alexander concluded the fire was intentional. Counsel for Car Gallery argued to the court that Mr. Alexander "found that an accelerant was put on top of the engine of the car in a plastic section and that the accelerant . . . created [an] intentional act in setting this car on fire."

The court discredited the report submitted by Car Gallery because Mr. Alexander did not have any experience, training, or education in fire analysis. The court also found it "a far-stretch for Defendant's analyst to conclude the fire as intentional when the Fire Department and Bob Howard Service do not report this

in their analyses." The court also pointed out that Mr. Alexander's report states that he was "unable to determine if an accelerant was used to start this fire."

The Oklahoma Supreme Court has often stated that where there is conflicting evidence on an issue of fact, an appellate court must defer to the judgment of the trial court. *See Mueggenborg v. Walling*, 1992 OK 121, 836 P.2d 112. The trial court has the advantage of observing first-hand the behavior and demeanor of the witnesses. *Id.* ¶ 7.

We find the misrepresentations about the vehicle's condition made by Car Gallery rendered the warranty disclaimer ineffective. In addition, the evidence presented during the hearings supported the small claims court's reasoning and conclusion. We find no error in the trial court's decision in favor of Ortiz and against Car Gallery.

CONCLUSION

After review, the Court Order Determining Judgment in Small Claims Action is hereby affirmed.

AFFIRMED.

BLACKWELL, J., dissents, and BARNES, J. (sitting by designation), concurs.

BLACKWELL, J., dissenting:

It is an unfortunate reality of life that a good car can become a bad car in an instant. All parties here agree that the plaintiff bought a used car[1] with no warranty of any kind. Yet the trial court, in effect, inserted a twenty-four-hour warranty into the parties' contract. Absent clear evidence of fraud, which I do not find in this record, I cannot assent to this judicial reimagining of the parties' agreement.[2] I respectfully dissent.

November 7, 2022

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[1] The car was a 2012 Chrysler 300 with 93,360 miles.

[2] Even presuming *Murray v. D & J Motor Co., Inc.*, 1998 OK CIV APP 69, 958 P.2d 823, which the majority places much emphasis on, was correctly decided—an open question in my opinion (*see, e.g.*, Timothy Davis, *UCC Breach of Warranty and Contract Claims: Clarifying the Distinction*, 61 BAYLOR L. REV. 783, 807 (2009) (criticizing *Murray* and similar cases as "ignore[ing] the buyer's burden of establishing a nonconformity in the goods as a predicate to its right to revoke") and Peter G. Dillon & Alvin C. Harrell, *Revocation of Acceptance Under UCC Section 2-608 as a remedy in a Consumer Sales Transaction Involving Conflicting Oral Quality Representations and Standardized Quality Warranty Disclaimer Language*, 25 OKLA. CITY U.L. REV. 269, 272 (2000) (agreeing with the result in *Murray*, but noting it was "a significant expansion of a buyer's remedies under UCC Article 2 as they have been commonly understood"))—I find nothing in this case indicating the type of "fraudulent representations or misrepresentations" that *Murray* required to set aside a similar disclaimer of warranty. *Id.* ¶ 28, 830. The plaintiff here was simply told such things as the car was "good to go" and that it "ran well and was a good car." By contrast, in *Murray* (in which it was "[un]disputed" that the dealer "sold a defective vehicle" to the plaintiff, *id.* ¶ 12, 827), the plaintiff questioned the salesman about concerning sounds coming from the engine during a test drive. *Id.* ¶ 7, 827. The salesman assured the plaintiff that "the engine had been replaced and 'there was nothing wrong with it.'" *Id.* In reality, in a post-purchase inspection, it was discovered that the "[r]ods were … knocking, the head gasket was blown, and the engine on the verge of total failure." *Id.* ¶ 5, 826. A material question of fact as to whether the dealer knew or should have known of the condition of the engine at the time of sale necessitated a trial. *See id.* ¶ 29, 830. Contrary to *Murray*, nothing in the evidence of this case suggests that the salesmen or dealer knew or should have known that anything that was said about the car was inaccurate at the time it was said. Even following *Murray*, the plaintiff here should have been required to come forward with evidence that, *at the time of the sale*, the car was *not* "good to go," *did not* "run well," and was *not* "a good car." Because there was no such evidence, judgment should have been entered for the defendant.