

Claim No: 425977

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**

Cite as: Fagan v. Fredericks, 2014 NSSM 29

BETWEEN:

HARRIET RAMONA FAGAN

Claimant

- and -

RANDY FREDERICKS

Defendant

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**REASONS FOR DECISION**

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**BEFORE**

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on May 13, 2014

Decision rendered on May 15, 2014

**APPEARANCES**

For the Claimant            self-represented

For the Defendant        self-represented

**BY THE COURT:**

[1] The Claimant responded to a kijiji ad in late November 2013, offering for sale a 2006 Buick Allure said to be in good condition with low mileage. The vehicle was being offered by the Defendant who operates a used car business. As it turned out, the Defendant himself was unavailable and did not meet with the Claimant at any time prior to the purchase. The Claimant dealt with a gentleman by the name of Tommy Julien, a sometime salesman for the Defendant.

[2] A bill of sale was entered into showing the VIN number and indicating that the vehicle had been driven 54,624 km. The invoice made clear that there was no warranty being offered and that the vehicle was sold “as is.” It did have a valid inspection sticker, and the test drive did not reveal anything serious enough to deter the Claimant from buying.

[3] The price negotiated with the Defendant’s salesman was \$4,500.00, including tax, but it was written up as \$4,300.00 because that is all the Claimant had at the time. There was a verbal agreement that an additional \$200.00 would be paid by the Claimant at some unspecified time.

[4] The vehicle experienced a few problems after purchase. The Claimant had to order a new key fob in order to get the door handles working properly. She bought brand new tires in an effort to try to get the tire pressure monitoring sensors to operate properly. Then there were transmission problems. Overall, the Claimant drove the vehicle very little in the three months that she owned it.

[5] During her later dealings with the GM dealership, trying to solve the transmission problem, she was informed that the dealership had earlier service records on this vehicle from about a year earlier, and that those records indicated that the vehicle had about 260,000 kilometres on its odometer. This discovery caused the Claimant to contact the Defendant and demand that he take the car back.

[6] The Defendant testified that he bought the car at auction, and that the “cluster” was not working. The so-called cluster is an electronic component that lights up the dash and gives out the readings for the speedometer and odometer, among other things. He says that, consistent with his practice, he obtained a working cluster from the junkyard and swapped it out in the subject vehicle. Although it showed some 54,000 km., he knew that this was not reflective of the mileage on the subject vehicle and that his intention was to sell the vehicle “true mileage unknown.” In other words, he says that this should have been disclosed to the Claimant and in all likelihood he simply forgot to tell Tommy Julien that this was the case for this vehicle.

[7] I am prepared to give the benefit of the doubt and find that there was an innocent error by the Defendant. However, the result was still a gross misrepresentation to the Claimant which gave her every legal right to return the vehicle and have the transaction rescinded.

[8] The Defendant accepted the vehicle in return, but is unwilling to refund to the Claimant all of her expenses spent trying to repair the vehicle.

[9] The issue of whether she is entitled to full redress is confused somewhat with the separate issue of whether or not there was a binding agreement by her to accept less. The court heard evidence from the Claimant's friend, Elmer Cain, who acted as an intermediary for the Claimant, and who had meetings and conversations with Tommy Julien and with the Defendant. There is a difference in their versions of the event. The Defendant and Mr. Julien take the position that the Claimant was prepared to accept \$5,000.00 and regard the balance (some \$529.56) as rental for the three months that she had the car. The Claimant and Mr. Cain say that the deal was that they would take the immediate \$5,000.00, with the balance to follow later as the Defendant would have to apply to the government for a tax rebate.

[10] My finding is that there was no agreement by the Claimant to restrict her claim to the \$5,000.00. At no time did she communicate that she would be content with that amount. The somewhat sketchy handwritten document drawn up at the time the vehicle was returned indicates that, at least from the point of view of the Claimant, she was waiting on additional money to be given to her.

[11] As a matter of law, given the misrepresentation made by the Defendant, the Claimant was in the strong position of being able to demand a refund plus all consequential losses. The court finds that she never gave up this entitlement.

[12] The Defendant was also critical of the Claimant for not dealing with him when problems with the vehicle arose. This is a curious position, given that the sale was without a warranty. The Claimant had every reason to expect that she was on her own, and she took the vehicle to service providers of her choice given that she expected to bear the cost. Once the Claimant found out about

the misstated mileage, she rightly contacted the Defendant. I find nothing wrong or inconsistent about her behaviour.

[13] Although there was no argument made at the hearing, the Claimant in her documents put forward a claim for general damages of \$100, which is the limit of what the court may award. Although I am sure that the Claimant experienced some anxiety and discomfort about the condition of the vehicle, I do not trace that to the misrepresentation about the mileage. Once the Defendant was confronted with the error, he quite properly agreed to take the vehicle back. I do not believe this is a case for general damages.

[14] There will accordingly be judgment in favour of the Claimant for \$529.56 plus the \$96.80 cost of issuing the claim and a further \$126.50 for the process server's fee.

**Eric K. Slone, Adjudicator**