

MEMORANDUM

Privileged Attorney Work Product

To: Lindsay Tarpley, Partner
From: Adam Maingot, Associate
Date: November 1, 2010
Re: *Howard v. Chastain*, File # 2010-325

Statement of Facts

Tim Howard (“Mr. Howard”) has engaged this firm to bring suit against Brandi Chastain (“Ms. Chastain”) for fraudulent misrepresentation. Ms. Chastain has sold a fake luxury watch to Mr. Howard. You have provided me with a memorandum and attached documents containing the details of the instant case and have requested that I research relevant case law to determine if Mr. Howard has a viable civil claim against Ms. Chastain for fraudulent misrepresentation.

Mr. Howard has provided evidence that he posted a request for an Akers Silver Lady on the www.WatchEnthusiasts.com website on July 21, 2010. A Beckham Akers Silver Lady (“Silver Lady”) is a rare twenty-fifth anniversary edition luxury watch that retails for fifteen-thousand dollars. The watch enthusiast website advises that based on their rarity and superior quality, Beckham watches consistently exceed their retail price in value and have been found to be priced as high as twice their retail value.

On July 22, 2010, Ms. Chastain emailed Mr. Howard in response to his post on the watch enthusiast website. In her email, Ms. Chastain claimed that she possessed a Silver Lady that had been worn once. Ms. Chastain stated that she had received the watch as a joint twenty-fifth birthday graduation gift from her watch hobbyist grandfather and would be willing to sell the

watch at the under market price of \$12,500. Ms. Chastain communicated that the watch ran five minutes slow and that she was selling the watch to supplement lost income after being laid off from a jeweler. Ms. Chastain had been employed at Maradona Jewelers for a month and had worked in the luxury watch department for a period of three days.

On July 25, 2010, Mr. Howard replied that he was interested, but would like to examine the watch in person. Mr. Howard hoped to inspect the special XXV engraving unique to the Silver Lady anniversary edition but not included in the photo submitted by Ms. Chastain. Due to prior commitments, Ms. Chastain was not able to meet Mr. Howard before his August 15, 2010, departure date for France. Mr. Howard had scheduled a month long cruise to celebrate his twenty-fifth anniversary with his wife. Due to the proximity of his departure date and Ms. Chastain's inability to meet in person, Mr. Howard agreed on August 1, 2010 to purchase the watch via pay pal without inspection. During his trip to Paris, Mr. Howard intended to give the Silver Lady to his wife as their twenty-fifth anniversary gift on the top of the Eiffel Tower. On August, 8 2010, Mr. Howard transmitted payment via PayPal's eCheck system in the amount of \$12,510. After confirmation of the payment was received, Ms. Chastain shipped her watch via U.S. Postal Service Insured Mail to Mr. Howard. The watch was received and signed for by Mr. Howard on August 13, 2010.

Upon return from his international cruise, Mr. Howard sent the Silver Lady to Ms. Chastain's alleged prior employer, Maradona Jewelers for an appraisal. On September 24, 2010, Mr. Howard was informed that the watch he purchased was a counterfeit valued at approximately \$100. Mr. Howard wishes to file a civil suit to recover damages for fraudulent misrepresentation.

Issue Statement

Under the Arkansas tort law offense of fraudulent misrepresentation, is Ms. Chastain likely to be liable, when (1) her assertion that she “had a Silver Lady” and would be willing to “sell it” for \$12,500 had a material influence on Mr. Howard’s decision to purchase the watch, (2) her tenure at a jeweler may be construed that she had knowledge her Silver Lady was a counterfeit, (3) a potential false statement that the Silver Lady was a gift from her grandfather coupled with her alleged tenure at a jeweler may be construed that she intended to induce Mr. Howard’s reliance on her representation, (4) that Mr. Howard justifiably relied on her inference of the legitimacy of the Silver Lady and (5) Mr. Howard incurred damages by receiving a counterfeit of the watch valued substantially less than the timepiece he had bargained for.

Brief Answer

Probably. Critical to obtaining judgment for fraudulent representation is the requirement that each of the five elements be satisfied. Mr. Howard can argue Ms. Chastain’s offer of a Silver Lady at a price drastically below the market had a material influence on his purchase decision. The courts may rely on circumstantial evidence to prove knowledge of falsity and intent to defraud. The fact that Ms. Chastain was employed by a jeweler will be sufficient to circumstantially establish that she had knowledge that the watch was a counterfeit and that she intended to defraud Mr. Howard. Ms. Chastain will argue that a reasonable person would not justifiably rely on authenticity of a faulty product costing \$12,500 and would be expected to simply inspect the item prior to purchasing it. Ultimately, Mr. Howard’s lack of experience with luxury watches and resulting damages will sufficiently attest to his reliance resulting from the alleged misrepresentation.

Discussion

In *O'Mara v. Dykema*, the Arkansas Supreme Court outlines five required elements for a cause of action of fraudulent misrepresentation. These five elements are:

(1) a false representation of material fact, (2) knowledge or believe on the part of the person making the representation that the representation is false, (3) an intent to induce the other party to act or refrain from acting in reliance on the misrepresentation, (4) a justifiable reliance by the other party and (5) resulting damages.

O'Mara v. Dykema, 942 S.W.2d 854, 857 (Ark. 1997).

The Arkansas courts require underlying facts to support each of the five discrete elements.

Country Corner Food & Drug, Inc. v. First State Bank and Trust Co. of Conway, Arkansas, 966 S.W.2d 894, 897 (Ark. 1998). Each of the discrete elements must be proven by a preponderance of the evidence. *Sellers v. West-Ark Construction*, 676 S.W.2d 726, 728 (Ark. 1984). Failure to provide the requisite evidence to prove each of the discrete elements entitles the defendant to either a dismissal of the complaint, or a summary judgment as a matter of law. *Short v. Little Rock Dodge, Inc.*, 759 S.W.2d 553, 554 (Ark. 1998), Ark. R. Civ. P. 56(c). The following five sections examine whether the facts of the instant case align with each of the five requisite sub-elements to establish a cause of action for fraudulent misrepresentation.

1. Assessing materiality of the representation

Mr. Howard was in the market to buy an Akers Silver Lady. Ms. Chastain claimed that she owned a "Silver Lady" and that she was willing to sell well below an expected asking price. When assessing the materiality of a representation, the courts consider the relative impact or influence that the representation had on the buyer's ultimate decision. *S. Equip. & Tractor Co. v. K & K Mines, Inc.*, 613 S.W.2d 596, 597 (Ark. 1981). In *Ellis v. Liter*, the Supreme Court of Arkansas instructs us that the plaintiff must only evidence that the "misrepresented fact had a

material influence on the decision and that fact need not be the sole or paramount element of the decision, just a substantial contributory factor. *Ellis v. Liter*, 841 S.W.2d 155, 156 (Ark. 1992). The mere assertion that Ms. Chastain possessed a Silver Lady and was willing to sell it qualifies as a material representation to Mr. Howard's purchase. Both the *Ellis* and *Southern Equipment* courts leave the decision of materiality up to the fact finder. *Id.*; *S. Equip. & Tractor Co.*, S.W.2d 596 at 597.

2. Ascertaining Defendant's Knowledge or Belief of the Falsehood

In *Jarratt v. Langston*, the court instructs that a person will satisfy the second element of fraudulent misrepresentation if he or she had knowledge that the representation was false or lacked the requisite knowledge to make the claim, but did so "with the intent to have the other party act upon them to their injury" and such injury ensues. *Jarratt v. Langston*, 138 S.W. 1003, 1004 (Ark. 1911). In absence of substantial (direct) evidence, the court may rely on circumstantial evidence to prove a claim. *Gregory v. State*, 15 S.W.3d 690, 693 (Ark. 2000). Further, the Supreme Court of Arkansas has instructed juries that they may rely on circumstantial evidence to infer fraud. *Interstate Freeway Services, Inc. v. Houser*, 835 S.W.2d 872, 874 (Ark. 1992).

In review of the emails between Ms. Chastain and Mr. Howard, the following has been communicated by Ms. Chastain as fact: That the Akers Silver Lady was received as a gift from a watch enthusiast, that she worked in a jewelry store for a month and that while working in the jewelry store she worked in the luxury watch department for three days. From these facts, Mr. Howard will be able to present the following argument: (1) that the average watch enthusiast would be able to spot a counterfeit (2) that it is highly unlikely that a grandfather would attempt

to deceive his granddaughter by giving her a counterfeit watch as a 25th birthday present and (3) an individual who has worked in a jewelry store would understand the quality expected of luxury timepieces and would be able to distinguish between a genuine and counterfeit timepiece. The Akers Silver Lady is an extremely expensive luxury timepiece with a reputation for quality. A reasonable person would expect a watch retailing for \$15,000 to keep flawless time. While working at Maradona Jewelers, Ms. Chastain had the opportunity to have the watch inspected and appraised. Mr. Howard will argue that without the inspection and appraisal, that Ms. Chastain did not have sufficient basis to assert that she had a Silver Lady. With this established, Mr. Howard is arguing that Ms. Chastain lacked the requisite knowledge to make the claim, but did so with the intent to have the other party act upon them to their injury.

Ms. Chastain will present two main arguments: (1) that an elderly person with an interest in watches should not be automatically considered competent enough to spot a counterfeit timepiece (2) an individual who held a retail job for a single month (one from which they were ultimately let go from) should not be automatically considered a specialist in the watch business. Ms. Chastain may follow up by stating that unless she spent that month with Swiss watchmakers at the Akers main production facility, that she did not have the requisite competency to distinguish between a counterfeit Silver Lady and an authentic one. Though the courts consider circumstantial evidence as sufficient as direct evidence, the weight of the circumstantial evidence must still meet the preponderance standard. *Sellers*, 676 S.W.2d at 728. In attacking the circumstantial evidence, Ms. Chastain is likely to plead ignorance claiming that “no one can be held liable for a false representation who honestly believed it when made.” *Sledge & Norfleet Co. v. Mann*, 103 S.W.2d 630, 632 (1937).

In close examination of the holding from *Jarrett*, the court instructs that a person will satisfy the second element of fraudulent misrepresentation if he or she lacked the requisite knowledge to make the claim, but did so “with the intent to have the other party act upon them to their injury.” Though Ms. Chastain must concede that she intended to induce Mr. Howard’s purchase, she will plead that she did so with the honest intention to sell what she believed to be a bona fide Akers Silver Lady and not with the intention to defraud. Ultimately the courts will find that Ms. Chastain had direct access to an employer who could have easily inspected and informed her of the watch’s authenticity. Without this inspection Ms. Chastain lacked the requisite knowledge to make an assertion of authenticity but did so anyway. Ultimately this induced a purchase that resulted in damages. The court will reach this finding in favor of Mr. Howard.

3. Examining Intentional Inducement of Reliance

As discussed in the previous subsection, the plaintiff has a burden to establish a cause of action by a preponderance of the evidence. *Sellers*, 676 S.W.2d at 728. Further, the plaintiff may rely on circumstantial evidence to prove the intent to induce. *Houser*, 835 S.W.2d at 874. It may be inferred based on circumstantial evidence that by intentionally providing key facts about her grandfather’s familiarity with fine wristwatches, her previous tenure as a jeweler and current financial distress that Ms. Chastain attempted to intentionally induce reliance. The court will reach this finding in favor of Mr. Howard.

4. Validating Justifiable Reliance

The question of justifiable reliance rests on whether a reasonable person would rely on the tortfeasor’s intentional deception or whether another prudent person possessing similar

knowledge and skill would not rely. W. Prosser & W. Keeton, *Prosser & Keeton on Law of Torts*, § 108 (5th ed. 1984). In *Keeton on Torts*, we are instructed that the “Plaintiff’s conduct must not be so utterly unreasonable, in light of the information apparent to him, that the law may properly say that the loss is his own liability.” *Id.* Originally, the Arkansas courts departed from Keeton’s higher standard of reasonableness, leaning toward the victim in fraud cases where knowledge and intent of the tortfeasor are proven. *Fausett & Co. v. Bullard*, 229 S.W.2d 490, 491-92 (Ark. 1950). In *Fausett*, the Supreme Court of Arkansas instructs us that “the recipient in a business transaction of a fraudulent misrepresentation of fact is justified in relying on its truth, although he might have ascertained the falsity of the representation had he made an investigation” (without considerable trouble or expense). *Id.* The more recent *Lancaster* court provides justifiable reliance’s outer boundary by requiring the purchaser to take action when “the facts should be apparent to [an individual] of his knowledge and intelligence, or he has discovered something which should serve as a warning that he is being deceived.” *Lancaster v. Schilling Motors, Inc.*, 772 S.W.2d 349 (Ark. 1989). In *Southeastern Distributing Co. v. Miller Brewing Co.*, the court found that Southeastern did not rely on Miller’s bid when it began obtain quotes with other producers. *Southeastern Distributing Co. v. Miller Brewing Co.*, 237 S.W.3d 63, 74 (Ark. 2006). In the instant case, Mr. Howard will argue that his lack of comparison shopping and ultimate purchase of the counterfeit Silver Lady evidences his reliance on Ms. Chastain’s offer. Further, Mr. Howard will argue that the *Fausett* court does not compel the purchaser to inspect the authenticity of the product. In contrast, Ms. Chastain will point to the more recent *Lancaster* court requiring the reasonable buyer to address apparent red flags. Ms. Chastain will argue that a reasonable person would expect a 15,000 watch to keep perfect time and that Mr. Howard could not justifiably rely on the contrary. Regardless of Ms. Chastain’s

argument, the court will find that a jewelry consumer should be able to justifiably rely on the word of a former jeweler.

5. Determining Whether Plaintiff Suffered Damages

Damages are suffered when the good received by the plaintiff is not that which has been bargained and paid for. *Tyson Foods, Inc. v. Davis*, 66 S.W.3d 568, 580 (Ark. 2002). Mr. Howard believed that he was bargaining for a twenty-fifth anniversary edition Beckham Akers Silver Lady retailing at \$15,000, with an estimated market price of \$30,000. In *Greiner Motor Co. v. Sumpter*, the court instructs that the market price may be considered when performing the benefit of the bargain damages calculation. *Greiner Motor Co. v. Sumpter*, 427 S.W.2d 8, 9 (Ark. 1968). The benefit of the bargain is calculated by finding the difference between the good represented at the time of purchase and the good ultimately delivered. *Id.* With the watch appraised at \$100, Mr. Howard's damages will fall within a range of \$12,400 to \$29,900.

Conclusion

In Arkansas, a case for fraudulent misrepresentation rests on the satisfaction of five individual components. These elements are (1) a false representation of material fact, (2) knowledge or believe on the part of the person making the representation that the representation is false, (3) an intent to induce the other party to act or refrain from acting in reliance on the misrepresentation, (4) a justifiable reliance by the other party and (5) resulting damages. It is evident that Ms. Chastain's assertion that she was willing to sell a Silver Lady at approximately \$17,500 below the market price had a significant material influence on Mr. Howard's decision to purchase the watch. Even if the facts do not conclusively evidence that Ms. Chastain had knowledge of the product's lack of authenticity or that she intended to defraud our client, Mr.

Howard will be able to draw on the circumstantial evidence to prove Ms. Chastain's knowledge of falsity and intent to induce reliance. Since the courts give equal weight to direct and circumstantial evidence, the court will rule in favor of the plaintiff for both elements. In turning to justifiable reliance, Ms Chastain has a strong argument that a reasonable person would not be able to justifiably rely on the authenticity of a \$15,000 watch with a timekeeping problem.

Regardless of this, the courts will take the policy position that a jewelry consumer should be able to justifiably rely on the word of a seller with experience in the field of jewelry sales. Finally, Mr. Howard will have no problem arguing that he suffered damages as he bargained for an Akers Silver Lady with a market value of \$30,000 and received a counterfeit watch at a loss of \$12,400.

When discussing the viability of judgment with the client, it is recommended that we discuss the challenges faced with the knowledge, intent and justifiable reliance elements. An approximation of estimated legal fees should be balanced against the likelihood of a judgment using the benefit of the bargain method.