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by: Colin E. Flora
Associate Civil Litigation Attorney

Indiana Supreme Court Determines “Sporty Car at a Great Value Price” Does Not Mean “It is Safe to Operate”

Today our discussion looks at a decision from the Indiana Supreme Court that I have been anxiously anticipating ever since the court granted transfer at the end of January. In a prior installment, we discussed the court of appeals decision in *Kesling v. Hubler Nissan, Inc.* After that decision, Hubler Nissan sought review by the Indiana Supreme Court which provides us today’s case for discussion: *Kesling v. Hubler Nissan, Inc.* Because the case was transferred to the Indiana Supreme Court, the court of appeals decision is vacated and not good law. Today’s discussion also marks the first time an opinion authored by the court’s newest associate justice, the Honorable Loretta H. Rush, has found its way onto the Hoosier Litigation Blog.

Without further ado, let us begin our discussion.

In order to understand the decision, we must first take a look at the facts that brought this case all the way to the state’s highest court. The case began with Miss Kesling seeing an ad on AutoTrader.com for a 1996 Mitsubishi Eclipse that provided photos and stated, in relevant part:

Price	\$2,981
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Body Style	Hatchback
Mileage	165,478
Exterior Color	Maroon
Interior Color	Grey
Engine	4 Cylinder Gasoline
Transmission	4 Speed Automatic
Drive Type	2 wheel drive—front
Fuel Type	Gasoline
Doors	Two Door

* * *

Seller's Comments: INTERNET SALE ... REDUCED PRICE!!
Trade-In, Automatic, Power Roof, CD/Cassette, Power Interior
Options, Cruise, Fog lights, Alloy Wheels . . . *Sporty Car at a Great
Value Price.*

Miss Kesling proceeded to the Hubler Nissan lot and purchased the vehicle. During her pre-purchase test-drive, she noted that the car idled roughly and was told that it “would just need a tune-up because it had been sitting for a while.” The purchase documents also included a statement that the car was sold “AS IS—NO WARRANTY . . . regardless of any oral statements about the vehicle.”

This would not have been a case had the facts stopped there. Right after purchasing the vehicle, Miss Kesling took the car to be inspected and learned that it suffered from extensive problems and, as Miss Kesling's expert would later testify, the vehicle was unsafe to drive. She filed suit against the dealership alleging three causes of action: (I) violations of the Deceptive Consumer Sales Act, (II) recovery under the Indiana Crime Victim's Relief Act, and (III) fraud. The trial court granted summary judgment in favor of Hubler Nissan and dismissed all three claims. The court of appeals in a split (2-1) decision reinstated all three claims. Integral to the court of appeals' majority decision was the conclusion “that calling the car a ‘Sporty Car at a Great Value Price’ could implicitly represent ‘that it is a good car for the price and that, at a minimum, it is safe to operate,’ thus preclud[es] summary judgment on [Miss] Kesling's deception claims.”

The split in the court of appeals' decision stemmed from Judge Ezra Friedlander's dissent. Judge Friedlander concluded that the “Sporty Car at a Great Value Price” was “typical used-car-sales puffery” and therefore an insufficient basis to form a claim for deception. This is because the law recognizes no weight to be given to statements that are puffery. Thus, a buyer has no right to rely on such statements and cannot bring an action for any harm resulting from such reliance.

In our previous discussion of the court of appeals case I outlined the distinction between the Crime Victim's Relief Act (CVRA) and the Deceptive Consumer Sales Act claims. Because the Indiana Supreme Court's decision on these claims hinged entirely upon whether Judge Friedlander was right and the statements were mere puffing, I will not once more outline the distinction here, but refer you to the prior post; with one note. The court of appeals decision was forced to determine whether implied representations were actionable under the Deceptive Consumer Sales Act. The supreme court, recognizing that this was a question of first impression, declined to address the issue. Since the court of appeals' decision has been vacated, this remains an unsettled issue.

The court disposed of both the Deceptive Consumer Sales Act and CVRA claims by concluding that the "Sporty Car at a Great Value Price" language was just puffery. The court gave a good description of what is puffery that I shall not attempt to more artfully phrase.

"[S]tatements of the seller's opinion, not made as a representation of fact"—such as claiming a product "is the best"—are "simply puffing which does not create an express warranty." Put another way, puffery consists of "empty superlatives on which no reasonable person would rely," or "meaningless sales patter,"—what Learned Hand called the "kind[] of talk which no sensible man takes seriously, and if he does he suffers from his credulity."

Aside from telling you that there was actually a highly respected twentieth century judge named Learned Hand, the court's summary also tells you that there are circumstances in which a salesman just gets to lie to you because the law doesn't think you should have listened.

Now I have already reached the punch line—that is the court found the statements to be puffery and therefore could not be read—as the court of appeals' majority believed, to mean "at a minimum, it is safe to operate." To borrow a line from Judge Michael P. Barnes, "I only write to vent my frustration with the legally mandated result." As much as I despise the voluntary payment doctrine, the law on "puffery" may turn my stomach even more quickly. There is a solid article from last fall's issue of the Southern Illinois University Law Journal entitled *Legal Tolerance Towards the Business Lie and the Puffery Defense: The Questionable Assumptions of Contract Law*. I direct anyone interested to read that piece. For my part, I reiterate my argument from the post on the court of appeals decision.

Forget the parsing of the language for just a second and realize that here you have a company that is trying to escape liability by arguing

some legal technicality and trying to say that the specific language of an advertisement never stated that the car they sold Heather for \$2,981 – not some \$500 junker on blocks in your buddy’s backyard – “**could be safely operated.**” My point here is that the car lot was actually trying to say that the law allowed them to sell a car that they knew was not safe to drive just so long as they never expressly said that it was. Now I ask you this rhetorically: have you ever gone to a car lot to buy a car and thought, “I wonder if this car that is being sold on the lot *can be safely operated?*” If you can honestly say that you have, to quote Steven Tyler of Aerosmith, “then mister you’re a better man than I.” Granted, due to the legal aspects of the case trying to argue that the car was actually safe was not really the issue in this appeal. Nevertheless, the defendant tried to convince a court that they were just allowed to hide the fact that the car was not safe to drive. The thought is just jaw dropping.

* * *

I cannot possibly read the word “car” in such close proximity as “great value” and not believe that the vehicle is “safe to operate.” Nothing in that phrase tells me that the car is a junker that needs serious repairs or can only be used for parts. Thus, my inclination is to believe that the vehicle is a “car” and can perform its functions as a car. These functions include safe operation. I cannot see how a vehicle that is not able to perform one of its most basic functions can ever constitute a “great value.” Indeed, this basic premise is what underlies the concept of the implied warranty of merchantability, which requires that a product sold be suitable for the usual intended purpose. I assume that this legal concept is not an issue in the case because it was disclaimed, likely in an owner’s manual or on the bottom of a sales form.

The Indiana Supreme Court, perhaps sensing my inevitable frustration with the holding that Miss Kesling had been subject to mere puffery, took the very rare step of providing a detailed discussion of, what it perceived to be, the dangers flowing from finding the language to more than mere puffery. The court’s primary concern is that to hold otherwise would be to construe the Deceptive Consumer Sales Act so broadly as to make it unpredictable and to lead to arbitrary results. The basis for this concern is the nature of the claim arising from inferences drawn from language and not the language itself.

Construing either “Sporty Car” or “Great Value Price” as a representation of fact is at best a double inference—first, taking the ad

to “impl[y] that the Eclipse was a good car for the price” (as opposed to simply being inexpensive), and second, inferring from the first inference that the car was “thus, at a minimum, safe to operate.”

I must, respectfully, disagree with the court’s analysis here. The quotation marks in the above excerpt are references to the court of appeals decision. I do not, for the life of me, see how the statement “Great Value Price” only implies that the car “was a good car for the price.” What else could that phrase possibly mean? I do not see this as an inference built upon an inference because the first inference is not an inference in the sense of having to abstract the words into an implied meaning. It is a specific declaration about the car. The only inference, in the implied sense, is whether “Great Value Price” necessitates the car to be safe to use.

If the difficulty is the potential problem of stacking inferences, then the solution would seem to be to limit the inferences to the objectively reasonable inferences to be drawn from the statement. Permitting advertisers to lie serves no purpose. That is, what would an objectively reasonable person think the words meant. While it is easy to say that buyers are foolish to rely on the statements of salesmen, it seems a flippant approach to a serious problem. One is left to wonder why salesmen and advertisers spend time and money puffing if there is no value to it. If there is value from it, then the lies pay dividends. That the law would hold on to a doctrine that permits boldfaced lies is abhorrent.

As to the fraud claim, the supreme court agreed with the court of appeals. The supreme court found there to be questions of fact meriting a trial as to whether Hubler Nissan knew the car required more than a tune-up. The court looked to established law requiring a seller to fully and honestly answer the inquiries of a buyer. Unsurprisingly, I agree with the court’s conclusion on the fraud claim. However, I do not agree with the conclusion that the advertisement was mere puffery.

Join us again next time for further discussion of developments in the law.

Sources

- *Kesling v. Hubler Nissan, Inc.*, --- N.E.2d---, No. 49S02-1302-CT-89, 2013 WL 5800379 (Ind. Oct. 29, 2013).
- *Kesling v. Hubler Nissan, Inc.*, 975 N.E.2d 367 (Ind. Ct. App. 2012), *trans. granted*, 982 N.E.2d 298 (Ind. 2013).

- *Bogolia v. Danielson*, 978 N.E.2d 756 (Table), No. 64A04-1201-CC-42, 2012 WL 5378144 at *5 (Ind. Ct. App. Nov. 1, 2012) (Barnes, J. concurring) (“I concur in full with the majority opinion. I only write to vent my frustration with the legally mandated result.”).
- Colin E. Flora, *Indiana Court Expands Interpretation of Consumer Protection Law*, HOOSIER LITIGATION BLOG (Sept. 7, 2012).
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- Indiana Crime Victim’s Relief Act – Ind. Code chapter 34-24-3.
- M. Neil Browne, Kathleen M.S. Hale & Maureen Cosgrove, *Legal Tolerance Towards the Business Lie and the Puffery Defense: The Questionable Assumptions of Contract Law*, 37 S. Ill. U. L.J. 69 (2012).

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