And The Defense Wins

Published 4-18-12 by DRI

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On February 9, 2012, DRI member **Phil Korovesis**, a shareholder with **Butzel Long** in Detroit, teamed with a colleague to obtain summary disposition from the Oakland County Circuit Court for the defendant seller of a classic race car in the case of *Bev Smith Ford v. Atwell*. The plaintiff sought damages in the amount of $1 million for breach of contract and fraud based tort claims. The case involved the 2007 sale of a factory built 1965 Dodge Coronet altered wheelbase drag race car. Only 12 of these vehicles were ever made by Chrysler and those were distributed to race teams around the country so that Chrysler could "race it on Sunday and sell it on Monday."

The seller found and bought one of these cars (the one raced by Dave Strickler of York, Pennsylvania) in rough shape in a southern Illinois barn in 1991. The car's body had been changed to a 1967 Charger body in 1966, the body on it when found. The seller spent years tracking down parts from the era and restored the car to show quality and back to a Dodge Coronet, as originally raced by Dave Strickler. This car was displayed at the Walter P. Chrysler Museum at Chrysler headquarters in Auburn Hills, Michigan, for several years and won awards at various car shows, including a prestigious concours event.

In late 2006, the plaintiff approached the seller about purchasing of the vehicle; he agreed to sell in March 2007, after providing the plaintiff with a binder of prospectus-like information about the car, its history, its condition when found and the restoration overall. The total purchase price was $600,000 cash and two other classic cars whose value was about $500,000. The contract provided plaintiff the first right to repurchase those other two cars if the seller ever chose to sell them.

The plaintiff sued in late 2010, claiming that it had been defrauded and that the seller did not sell the "real and authentic Dave Strickler" vehicle because too many "non-original" parts were used in the restoration. The plaintiff also claimed that the seller had breached the agreement by selling one of the other cars in the deal (a 1964 Ford Thunderbolt race car) without first giving the plaintiff the opportunity to buy back that vehicle. The seller's position throughout the litigation was that it indeed was the real and authentic car and that as many original and era-appropriate parts as humanly possible were used in the restoration.

The deposition of one of plaintiff's experts confirmed that virtually everything about which the plaintiff complained could have been found upon inspection by a qualified person with knowledge of the era and the vehicles in question. In fact, under examination, the expert admitted that these items were "obvious."

On the issue of the right of first refusal, the seller testified he did provide notice of the pending sale of the Thunderbolt and, in fact, the new buyer picked it up from the plaintiff, who still had it in its possession.

In light of the expert's admission and the fact that the level of restoration was otherwise "obvious," the seller argued in his dispositive motion that the plaintiff had waived its rights to object to the items it now raised by not fully inspecting the vehicle before or immediately after purchase. The seller argued common law waiver and failure to provide timely notice of breach under the Uniform Commercial Code. Lastly, seller argued that plaintiff's tort-based claims failed to state a cause of action because there was no duty to the plaintiff outside of the contract.

The circuit court judge agreed with the seller's arguments and granted the dispositive motion. She found persuasive the fact that the plaintiff did not, as a matter of law, provide timely notice of breach under UCC Article 2 (waiting over two years to file suit) and common law waiver as to the right of first refusal because the plaintiff released the Thunderbolt to the purchaser without objecting. As to the tort claims, the judge concluded that there could be no reasonable reliance given the opportunity to inspect and that the restoration items were "obvious" and, in any event, that there was no separate duty owed to the plaintiff.