TWENTY-THIRD JUDICIAL CIRCUIT OF VIRGINIA

DAVID B. CARSON, JUDGE
ROANOKE CITY COURTHOUSE
315 CHURCH AVENUE, S.W.
P.O. BOX 211
ROANOKE, VIRGINIA 24002-0211
(540) 853-2436
FAX (540) 853-1040
DCARSON@VACOURTS.GOV

COMMONWEALTH OF VIRGINIA

CIRCUIT COURT FOR THE COUNTY OF ROANOKE
CIRCUIT COURT FOR THE CITY OF ROANOKE
CIRCUIT COURT FOR THE CITY OF SALEM

October 13, 2017

VIA EMAIL jwhiting@jamlaw.net
kries@jamlaw.net
AND FIRST CLASS MAIL
Jason R. Whiting, Esquire
Kenneth J. Ries, Esquire
Johnson Ayers & Matthews, PLC
P. O. Box 2200
Roanoke, VA 24009

VIA EMAIL dwilliamson@williamsonlawfirmpc.com
AND FIRST CLASS MAIL
David O. Williamson, Esquire
Williamson Law Firm
302 Washington Ave.
Roanoke, VA 24016

Re: *Dena Marie Hughes & Jay Nicholas Hughes v. Robert Young Auto & Truck, Inc.*
Roanoke City Circuit Court
Case Number CL16-1364

Dear Counsel:

Following a bench trial on August 9, 2017, the parties submitted this matter to the Court for a decision on the merits. The Court has reviewed and considered the pleadings, testimony, demeanor of the witnesses, exhibits, and written arguments of counsel presented following the August 9 trial. For the reasons that follow, the Court finds for the Plaintiffs in the amount of $27,900, with interest, plus attorneys' fees and costs.

FACTS

This case arises out of the alleged wrongful sale of Plaintiffs' 2005 Honda S-2000 ("the Honda").

On February 21, 2016, Dena and Jay Hughes' ("the Hugheses") son David was in an accident while recklessly driving the Honda in Botetourt County, Virginia. Trooper Michael

Atkins of the Virginia State Police investigated the accident and ultimately arranged for Defendant, Robert Young's Auto and Truck, Inc. ("Robert Young's") to tow the Honda from the scene. Robert Young's had an unpaid, statutory garage-keeper's lien on the Honda for the towing and storage fees, so it opted to sell the car by public auction, a procedure governed by statute. Robert Young's ran the DMV transcript and found the registered owner to be American Honda Finance Corporation. Robert Young's then sent the registered owner, by certified mail, a notice of lien and public auction, which was to be held on March 30, 2016. The notice subsequently was returned undeliverable. Robert Young's testified that it posted the required auction notices and proceeded to hold the auction at its Roanoke office on March 30. No one attended the auction, so Robert Young's bought the Honda from itself for $100.

Mrs. Hughes testified that the Hugheses did not pick up the Honda because, based on the representation of law enforcement, they believed the Honda was evidence in a criminal case and they could not pick it up. On April 1, 2016, Mrs. Hughes called Robert Young's, and an employee informed them that the Honda had been sold at auction the previous day to an out-of-state buyer. In a subsequent phone call, Robert Young's informed Mrs. Hughes that the out-of-state buyer was willing to walk away from the sale, and she could get the Honda if she paid $4,794.81, which represented the towing, storage, and auction fees. The Hugheses chose not to pay that price. Instead they filed this suit in which they seek Compensatory and Punitive Damages for conversion, violation of the Virginia Consumer Protection Act, and Fraud.

ANALYSIS

I. Conversion Claim

The Court denies relief on the ground of conversion.

An action for conversion has been long recognized in the Commonwealth of Virginia. "Where a person has illegally seized another's personal property and converted it to his own use, the owner may bring trespass, trover, detinue or assumpsit."[1]

Trespass to chattels "occurs when one party intentionally uses or intermeddles with personal property in rightful possession of another without authorization."[2] Damages for this action are limited to the object of the conversion.[3]

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[1] Raven Red Ash Coal Co. v. Ball, 185 Va. 534 (1946).
[2] Mallory v. City of Richmond, 69 Va. Cir. 100, 101 (2005) (citing Vines v. Branch, 244 Va. 185, 190 (1992)).
[3] *Id.*

An action in detinue is sometimes called replevin and seeks the return of the object converted.[4]

"In an action for assumpsit one must prove that funds received by one person or locality rightfully belong to another. . . . In order to establish a claim for assumpsit the plaintiff needs to allege a privity between the parties to an action."[5]

In this case, Plaintiffs' action does not fall under trespass, detinue, or assumpsit as they are not seeking the return of the Honda, but are seeking money damages.

Trover is "a form of action which lies to recover damages against one who has, without right, converted to his own use goods or personal chattels in which the plaintiff has a general or special property right."[6] A conversion "is any unauthorized dealing with the goods of another by one in possession, whereby the nature or quality of the goods is essentially altered, or by which one having the right of possession is deprived of all substantial use of the goods, permanently or temporarily."[7] Virginia courts have long recognized that "to maintain trover, the plaintiff must show a conversion of personal property by the defendant, and that he had at the time of the conversion a general or special right of property in the thing converted, and also the possession *or a right to the immediate possession thereof.*"[8]

Va. Code § 46.2-644.01 states that "every keeper of a garage . . . shall have a lien upon such vehicles for the amount that may be due him for the towing, storage, recovery, and care thereof, until such amount is paid." This statute does not include any language that deprives the owner of immediate possession of his vehicle despite the lien. However, Va. Code § 46.2.1209 provides that "no person shall leave any motor vehicle . . . immobilized or unattended on or adjacent to any roadway if it constitutes a hazard in the use of the highway." The statute goes on to say that "any law-enforcement officer . . . may remove [the vehicle] or have it removed to a storage area for safekeeping. . . . *Before obtaining possession of the motor vehicle . . . its owner or successor in interest to ownership shall pay to the parties entitled thereto all costs incidental to its removal or storage.*" The Norfolk Circuit Court in *Shaqwena Anjoli Daughtry v. Gray's*

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[4] *See* Herrington v. Harkins's Adm'rs, 40 Va. 591 (1843).
[5] Town of Cedar Bluff v. Town of Richlands, 92 Va. Cir. 438, 440-41 (2010) (citing City of Norfolk v. Norfolk County, 120 Va. 356 (1917)).
[6] Eastern Lunatic Asylum v. Garrett, 68 Va. 163, fn (1876).
[7] *Id.*
[8] *Id.* (emphasis added). *See* Harvey v. Epes, 53 Va. 153, 169 (1855) (holding that the plaintiff must show he had a "present right of possession").

Body Shop, Inc., applied this statutory language to conclude that the plaintiff did not have the right to immediate possession of the vehicle.[9]

The Court finds that Plaintiffs' action in this case is akin to the ancient action in trover. Plaintiffs have the burden of proving by a preponderance of the evidence that Defendant illegally seized a car belonging to the Plaintiffs, that Defendant converted the property to its own use, and that Plaintiffs had the right to immediate possession of the vehicle. Plaintiffs have failed to introduce any evidence that they had the right to immediate possession. Instead, the evidence before the Court is that Defendant had a statutory lien on the vehicle for at least some amount due to the towing and storage services. Accordingly, the Court concludes that Plaintiffs did not have the right to immediate possession of the vehicle and therefore denies recovery on the conversion claim.

II. Virginia Consumer Protection Act ("VCPA") Claim

The Court grants relief based on the VCPA.

The purpose of the VCPA is to outline ethical standards between suppliers and consumers in order to protect the public, and it is to be construed in favor of the injured party.[10] The VCPA prohibits a myriad of fraudulent acts or practices committed by a supplier in connection with a consumer transaction.[11] The VCPA defines a supplier as "a seller, lessor or licensor who advertises, solicits or engages in consumer transactions, or a manufacturer, distributor or licensor who advertises and sells, leases, or licenses goods or services to be resold, leased, or sublicensed by other persons in consumer transactions."[12] A consumer transaction, relevant to this case, is "the advertisement, sale, lease, licenses or offering for sale, lease or license, of goods or services to be used primarily for personal, family or household purposes."[13]

In this case, Defendant offered to sell Plaintiffs the Honda, once belonging to Plaintiffs and acquired by Defendant through the statutory auction process. This offer to sell the car was a consumer transaction as contemplated by the VCPA. Defendant is a supplier because it is a seller that engages in consumer transactions in the form of towing, storage, and car sales. Additionally,

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[9] 82 Va. Cir. 366, 369 (2011).
[10] Va. Code Ann. § 59.1-197 (1950 as amended). *See* Ballagh v. Fauber Enters. 290 Va. 120 (2015).
[11] Va. Code Ann. § 59.1-200 (1950 as amended).
[12] Va. Code Ann. § 59.1-198 (1950 as amended).
[13] *Id.*

the Hugheses would use the Honda for primarily personal, family, or household purposes. Therefore, the VCPA applies in this case to the offered sale of the Honda.[14]

The Plaintiffs allege the Defendant, in violation of the VCPA, made the following misrepresentations when it offered to sell them their car: (1) Defendant sold the car at a public auction to someone out-of-state; (2) Defendant conducted the towing and auction procedures according to Virginia law; (3) The "out-of-state purchaser" was willing to walk away; and (4) $4,794.81 represented the charges and fees for the Defendant's towing, storage, and auction services.

Taking the alleged misrepresentations in order, the Court finds as follows: (1) Defendant told both Dena Hughes and Trooper Atkins that an unidentified out-of-state purchaser bought the vehicle, when in fact Defendant, itself, bought the Honda for $100.

(2) Defendant did not follow DMV procedure because it failed to post proper notices. Pursuant to Va. Code § 46.2-644.03, before a garage-keeper can satisfy its lien by selling the car at public auction, it "shall advertise the time, place, and terms thereof in a public place."[15] The section goes on to define "public place" as "a premises owned by the Commonwealth or a political subdivision thereof, or an agency of either, that is open to the general public."[16]

Defendant testified that its employees posted the required notices at the Hollins Branch and Williamson Road libraries, and at the Cloverdale post office in Botetourt County. However, the evidence before the Court is that the Hollins Branch library assistant had never seen Defendant's employees and, while she had seen some of Defendant's notices before, no one asked permission to post, and she did not see any notices on the date the posting allegedly occurred. The Williamson Road librarian testified that that branch closed on June 1, 2016, and nothing could have been posted there in March when Defendant said it posted. Finally, the Cloverdale post office is not a premises owned by the Commonwealth or a political subdivision thereof because it is a federal facility, and the postal worker at that office testified that she had never seen Defendant's employees, and she had never seen any auction notices posted. Ultimately, the Court concludes that, contrary to the testimony of Defendant's employees, Defendant never posted the requisite notice.

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[14] The Court distinguishes between the initial sale of the Honda at auction and the offer of sale to the Hugheses. While Va. Code Ann. § 59.1-199 (A) excludes from VCPA protection sales otherwise authorized by statute, the VCPA violation in this case did not occur via the auction but rather by the direct offer of sale to the Hugheses.

[15] Va. Code Ann. § 46.2-644.03 (1950 as amended).

[16] Va. Code Ann. § 46.2-644.03 (1950 as amended). While the Court recognizes there is a dispute among the parties regarding how many notices must be posted, it is not necessary to resolve that issue as the Court finds there were no statutorily compliant notices posted at all.

(3) Defendant represented that an out-of-state purchaser was willing to walk away from the sale, but, again, Defendant purchased the Honda.

(4) Defendant represented that $4,794.81 was the total cost of the towing, storage, and auction fees for the car, but the actual costs and fees of Defendant's towing, storage, and auction services were $550 for towing (Defendant stated $1100), $185.00 + 9.81 tax administrative fees for running the DMV transcript, sending certified mail, posting notices, and a $50 storage fee per day for the 40 days between February 21 and March 30 (Defendant stated $2500 instead of $2000). Defendant's own testimony is that it invented the $1000 auction fee, which the Court finds does not represent the actual fees since Defendant's only incurred cost was the $100 it paid for the vehicle, making the total cost to Defendant $2,844.81.

Ultimately, the Court finds that all four statements above, made by Defendant to Plaintiffs in its offer to sell the car, were misrepresentations in violation of at least Section 14 of the VCPA, which prohibits the use of "any other deception, fraud, false pretense, false promise, or misrepresentation in connection with a consumer transaction."[17]

III. Damages

Pursuant to Va. Code § 59.1-204, Plaintiffs are entitled to recover actual damages or $500, whichever is greater.

The actual damages in this case amount to the value of Plaintiffs' loss—i.e. their vehicle. The parties presented conflicting evidence on the value of the Honda. Va. Code § 8.01-419.1 permits the Court to consider the NADA value of the car on the relevant date. Based on the evidence presented, the Court fixes the actual damages at $9,300, which represents the NADA "rough trade in" amount.

Further, the Court finds Defendant's violation of the VCPA to be willful. Pursuant to Va. Code Ann. § 59.1-204, this Court trebles the award to $27,900, plus interest from August 9, 2017. The Court also awards Plaintiffs reasonable attorney fees, costs, and expenses to be determined by the Court upon Mr. Whiting's submission of an affidavit outlining such fees, costs, and expenses.

[17] The Court notes that Plaintiff may have proven actual fraud by the preponderance of the evidence, however it is unnecessary for the Court to decide that issue because it has found fault on other grounds.

By October 27, 2017, Mr. Whiting shall prepare and submit an affidavit, setting forth the Plaintiffs' claimed attorneys' fees, costs, and expenses. By November 3, 2017, Mr. Williamson shall submit any objections to the Plaintiffs' fees, costs, and expenses.

By November 10, 2017, Mr. Whiting shall prepare and submit an agreed Order consistent with this opinion that preserves all parties' objections, leaving a blank for attorneys' fees, costs, and expenses. If the Order is not agreed to by all the parties, then Mr. Williamson may submit a proposed Order by November 15, 2017. By the close of business on November 17, 2017, I intend to enter the Order (inclusive of fees, costs, and expenses) I conclude is most consistent with my opinion. I attach for your benefit my instructions regarding the submission of Orders.

Very truly yours,

David B. Carson

DBC:mpr
Enclosure