

Citation: *Temisanren v. Hoa*, 2024 YKSM 4

Date: 20241122
Docket: 22-S0079
Registry: Whitehorse

SMALL CLAIMS COURT OF YUKON
Before His Honour Chief Judge Cozens

PATRICIA TESIMRO TEMISANREN

Plaintiff

v.

LE MINH HOA

Defendant

Appearances:

Patricia Tesimro Temisanren
Le Minh Hoa

Appearing on own behalf
Appearing on own behalf

REASONS FOR JUDGMENT

[1] The Plaintiff, Patricia Temisanren has claimed against the Defendant, Le Minh Hoa, for the amount of \$4,399.95 plus costs resulting from the sale of a 2009 Mazda 5 motor vehicle (the “Mazda”) to the Plaintiff that she claims was a defective vehicle, a fact known to the Defendant but not disclosed to her at the time of the sale.

[2] The trial commenced on February 1, 2024, but was adjourned for continuation to June 3, 2024, due to my decision that an interpreter was required for one of the Defendant’s witnesses to adequately testify.

[3] Judgment was reserved on that date.

[4] The Plaintiff testified on her behalf, as well as Tony Fok, owner of Certified Auto Services (“Certified”), and Jaweria Qureshi, a friend of the Plaintiff.

[5] On approximately January 24, 2023, the Plaintiff responded to a posting on Facebook Marketplace placed there by the Defendant for the sale of the Mazda. Ms. Qureshi first went on her own to view the Mazda with the Defendant and conducted a test drive. Subsequently, Ms. Qureshi re-attended with the Plaintiff and a further test drive was done, after which an agreement was made for the Mazda to be purchased by the Plaintiff for the price of \$2,800.

[6] The Plaintiff claims that approximately 10 days after purchasing the Mazda, an AT Warning (“AT”) light appeared on the dashboard. The light had not been present when she purchased the Mazda. She contacted the Defendant who advised her that the light possibly meant that the transmission oil was low. The Plaintiff took the Mazda to Certified, where she was advised that the transmission of the Mazda needed to be replaced. Certified further informed the Plaintiff that the Defendant had brought the Mazda into Certified for servicing in the previous year, at which time the Defendant had been told that the Mazda likely needed a new transmission. The Defendant had declined to have this work done and had taken the Mazda back.

[7] The Plaintiff parked the Mazda in February 2023 and has not operated it since that time.

[8] The Defendant claims that the AT light was visible in the Facebook Marketplace posting. In the Reply, the Defendant states:

The “AT” light picture had in the Facebook Marketplace before the plaintiff bought it, not appear after ten days buying as the claim of the plaintiff. Defendant didn’t hide it. Like defendant said to the plaintiff before buying, defendant was not a mechanic, so defendant doesn’t know what’s going on with this car either.

[9] The Defendant provided a photograph that he says was part of the Facebook Marketplace posting. The photograph is of the dashboard and shows several lights illuminated, including the AT light, a check engine light, a brake light, a park light, and a seatbelt light. While not clear on the photograph that was provided, when I entered the website identified in the Reply, I was able to observe the same dashboard display in better quality.

[10] The Defendant also provided some communications from Facebook Marketplace, dated January 24, 2023, that included an exchange with a third party as follows:

Syed: Hi, is this still available?

Defendant: Yes. It is. Do you want to see it?

Syed: What is your last price sir.?

Because your car engine light is showing here

On picture’s

Defendant: \$3,000 is the last price.

[11] The Defendant claims that he had the Mazda repaired at Canadian Tire in May 2022, and that Certified had completed repair work on the Mazda, including in both cases repairs to the transmission, and that he disclosed the documents from Canadian Tire and Certified to the Plaintiff at the time of the sale.

Witness Evidence

Tony Fok

[12] Mr. Fok testified that he is the owner of Certified. He stated that when the Plaintiff brought the Mazda into Certified on February 17, 2023, he told her that he recognized it as having been brought into Certified before. He told the Plaintiff that the shifting problem she was experiencing with the Mazda was the same problem as it had when it was brought into Certified on the previous occasion. He confirmed this by going through the paperwork on file with Certified.

[13] Mr. Fok stated that on the earlier occasion, he had changed the engine mount to see if that fixed the problem, but it did not. He told the customer, identified as the Defendant, that he could investigate further as it likely had something to do with the transmission, but the Defendant declined his offer, paid the bill, and left. Mr. Fok identified the June 28, 2022 Certified invoice in regard to this earlier occasion that he had dealt with the Mazda, (although the invoice was made out to “Harry Le”). He agreed that the Defendant had attended at Certified with a third party.

[14] The evidence was somewhat confusing as to who exactly was involved in bringing the Mazda to Certified, however, it was clear from the line of questioning in cross-examination that the Defendant was at least directly involved, a part of, or aware of the Mazda being inspected at Certified on the previous occasion, and the information regarding the transmission issue. Mr. Fok testified that he told the Defendant, and possibly the third party, what the problem was, likely being a transmission issue, and that, if so, the transmission would likely need to be replaced. He said that the

Defendant, and/or possibly the third party, declined to direct him to do any further investigation into this likely problem. Mr. Fok agreed that while the Mazda still ran when it left Certified, it still had a shifting problem, in particular when put into reverse.

Jaweria Qureshi

[15] Ms. Qureshi testified that she was a co-worker of the Plaintiff in February 2023. She stated that she went first, before the Plaintiff did, to look at the Mazda after they both saw the Facebook Marketplace posting. She negotiated a price for the purchase, and returned with the Plaintiff afterwards. She said that the Defendant and the Defendant's wife, who was also involved, stated that the Mazda was in good shape, and that the only reason they were selling it was because they had purchased a new vehicle.

[16] She also stated that there were no dashboard lights when she inspected the Mazda, in particular no AT light, as she would have noticed this. When shown the photograph of activated dashboard lights, Ms. Qureshi denied that this photograph, as depicted, was included in the Facebook Marketplace posting, or that these dashboard lights were visible when she and the Plaintiff inspected and purchased the Mazda. She stated that after the Claim had been filed, she and the Plaintiff went on Facebook Marketplace to see if the listing was still there. The listing was still there, but was time stamped as having been posted a week earlier (approximately). When they clicked on the photographs, there was now a new photograph that showed the dashboard lights visible with the AT light on. Ms. Querishi said that the photograph was not included in the original Facebook Marketplace listing. She believes that this was a new listing for

the Mazda with this photograph with the lights visible was added after the purchase of the Mazda.

[17] Ms. Qureshi said that approximately a week after the purchase of the Mazda the Plaintiff told her that there was something going on with it, and that the AT light was now showing. She and the Plaintiff took the Mazda to Jiffy Lube, who said they would not service the Mazda until it had been inspected by a mechanic, as they were concerned about it being safe.

[18] Ms. Qureshi and the Plaintiff then went to Certified and explained the problem to Mr. Fok, who confirmed that this was the same vehicle he had previously inspected, and that he had told the owner at that time that the transmission might need to be replaced.

[19] She and the Plaintiff went to Canadian Tire and asked whether they had done any transmission work on the vehicle. The Canadian Tire representative said that while some work had been done by them on the Mazda, none of this work was done in regard to the transmission.

[20] Ms. Qureshi said that at the time of the purchase, the Defendant did not provide her or the Plaintiff with any documentation from Canadian Tire or from Certified in regard to the Mazda. She disagreed that the Defendant had told her or the Plaintiff that the Mazda was “shocking”. She stated that all he told them was that the door handle was broken.

Patricia Tesimro Temisanren

[21] The Plaintiff testified that she had just recently moved to Canada. While English is not her first language, she is quite proficient in it. She had no particular sophistication in automobile mechanics, although she stated that she knew enough to be concerned if lights indicating potential problems were visible on the dashboard. She needed a vehicle in order to transport her children who would soon be coming to Canada.

[22] The Plaintiff testified that on the day she saw the Facebook Marketplace posting, she was working, so her co-worker, Ms. Qureshi went to look at the Mazda first. The Plaintiff stated that there was no AT light or check engine light visible when she looked at the Mazda, either in person, or in the Facebook Marketplace posting. She says that she knows enough that she would not have bought the car had any of these lights been displayed when she and Ms. Qureshi test drove it. She says that the Mazda drove smoothly when she test drove it. She did not testify as to whether she had put the Mazda into reverse or not at any time. She stated that the Defendant did not say anything to her about the Mazda having anything wrong with the transmission.

[23] The Plaintiff testified that at the time she purchased the Mazda, she had a conversation with the Defendant's wife during which time she talked about needing the car to transport her baby and children. When she asked whether the Mazda was in good condition, the Defendant's wife said that it was in good condition, and that she and her husband had been driving it to transport their children to school.

[24] The Plaintiff said that she told the Defendant that she needed a vehicle to transport her children, that she did not have her husband with her, that she did not know

much about vehicles, and that she specifically asked the Defendant if there was anything wrong with the car, to which he replied that there was not. She stated that the Defendant told her that the Mazda was in good condition and that he had been using it.

[25] The Plaintiff said that she did not have the Mazda checked over by a mechanic prior to the purchase because she trusted the Plaintiff, relied on what he said, and she did not observe anything that gave her any concerns about the condition the Mazda was in. She felt that there would not therefore be any problems. She stated, at the trial, that had she known of the transmission problem the Mazda had, she would not have purchased it.

[26] She said that approximately five or six days after she had purchased the Mazda, the AT light was displayed when she started it. She said that she then investigated into what the AT light display meant, including communicating with the Defendant about what it could mean. She said that it then went off for a couple of days and then came back on again. It was not constantly on. She said that if the AT light had been visible prior to her purchasing the Mazda, she would not have only first started to inquire into what the AT light meant after she had purchased it.

[27] The Plaintiff testified that she took the Mazda to Certified, on the recommendation of a friend, and that Mr. Fok advised her that the Mazda had been brought into Certified before. She said that Mr. Fok asked her whether the Defendant had told her that the Mazda had a transmission problem, as he had previously told the Defendant that this was a problem with the Mazda.

[28] The Plaintiff was questioned by me about the meaning of her February 10, 2023 SMS exchange with the Defendant that read:

P: Good evening Sir, trust you and family are fine. Pls do you know what "AT" light on the dashboard means?

D: Thanks. I sorry I don't know exactly what happen. But this means something with automatic transmission, maybe automatic transmission fluid is low.

P: Ok. I will take it down for checking tomorrow. The transmission was worked on last year right? Kindly let me know what was done so I can explain better to the mechanic tomorrow. Many thanks.

[29] She stated that she had learned through some research that the AT light could mean that there was a transmission issue and that there could have been work done on the transmission before. The Plaintiff said that she was only asking the Defendant whether the transmission had been worked on, and that she did not have any prior knowledge that it had, in fact, been worked on.

Hoangvan Doaen

[30] The Defendant's wife, Ms. Doaen, testified with the assistance of an interpreter. She stated that she was present when, firstly the Plaintiff's friend came to look at the Mazda, and then again when the Plaintiff and this friend came together to view it. She said that the Defendant went for a test drive with them. She was present when the sale of the Mazda was concluded. She testified that the original Facebook Marketplace posting contained the photograph with the AT light indicator displayed. Ms. Doaen further stated that the Defendant showed the Plaintiff the documentation indicating previous repairs had been completed on the Mazda (which I assume are the Canadian

Tire and Certified documents previously referred to), although she stated that he did not give these to the Plaintiff until after she had purchased the Mazda.

[31] Ms. Doaen stated that when the Plaintiff came with her friend to the house to look at the Mazda, she told them that the AT light on the Mazda would sometimes come on. She said that the AT light was on at that time, and this was shown to the Plaintiff. She also told them that the Mazda was working at that time, and that she used it to take the kids to school, but denied saying that it was in good condition. Ms. Doaen said that she told the Plaintiff and her friend that she and the Defendant only used the Mazda around town for short trips. She said that she told the Plaintiff that the Mazda should not be driven long distances.

[32] Ms. Doaen denied that the Plaintiff had asked her to tell her if there was anything wrong with the Mazda. She denied that she told the Plaintiff that the car was in good condition, but in fact told her that while it was usable it was not in good condition.

Le Minh Hoa

[33] The Defendant had also recently moved to Canada. He also had no sophistication in automobile mechanics. As is the case with the Plaintiff, English is not his first language. There was some concern expressed by the Plaintiff as to the Defendant's apparent struggles with English during the trial, as was also the case with his wife, because the Plaintiff testified, as did Ms. Qureshi, that during the interactions between them at the time of the purchase of the Mazda, the Defendant and Ms. Doaen communicated only in English with no problem. Without resolving whether the struggles with English claimed by the Defendant and his wife were feigned, I am satisfied that the

Defendant was sufficiently able to communicate in English such that no misunderstanding between the parties as to the condition of the Mazda was due to difficulties and confusion arising from language issues such that it would have any impact on the issues before me.

[34] The Defendant testified that the Mazda was in workable condition, although sometimes it would jerk. He said he informed all the people who came to look at the Mazda of this. He said that is why he did the repairs that he did on the car, such as installing a new battery and new winter tires.

[35] The Defendant said that he provided all the information he had about the Mazda in detail on the Facebook Marketplace posting. He said that this posting also included the photograph with the dashboard displaying the AT light on. He says that the photograph of the dashboard that he provided at trial is the same one that was originally posted on Facebook Marketplace. The Defendant provided a communication from a “Syed” dated January 24, 2023, that questioned why there was a visible engine light in the Facebook Marketplace posting photograph, as proof that the AT light was displayed on the original posting. The Defendant denied fabricating or altering this communication.

[36] The Defendant stated that he did not discuss the engine light being on with the Plaintiff, because he did not know what it meant.

[37] The Defendant testified that he explained to both the Plaintiff and Ms. Qureshi when they went to look at the car about it jerking sometimes. He testified that, as he was not a mechanic, he could not tell them why the jerking was occurring. He said that

he wanted to be clear about everything. He testified that he showed them the receipts from the previous repairs done to the Mazda and, after the purchase was completed, he put these documents into the glove box of the Mazda. He denied telling the Plaintiff and Ms. Qureshi that the Mazda was a good car. He agreed that he had said that it was a good deal. He denied having concealed any information about the Mazda to the Plaintiff at the time he sold it to her. He denied knowing that the Mazda was defective, in particular in regard to the transmission. He says that he made no promises, warranty or commitment as to the quality of the Mazda to the Plaintiff. He says that once the purchase was completed, he no longer had any responsibility for the Mazda.

[38] The Defendant stated that the Mazda was still drivable after it had been sold, because the Plaintiff was able to drive it to Certified.

Analysis

Law

[39] The law in regard to sale transactions between individuals not in the business of selling the particular item has been recently canvassed by Demong J. in the case of ***Truong v. Le*** 2024 SKPC 5. The Plaintiff had relied on the representations of Mr. Le, who was the husband of the seller, as to the condition of a used car when deciding to purchase it. The seller of the car was not directly involved in the transaction. The Plaintiff claimed that Mr. Le, owing her a fiduciary duty, breached that duty by not disclosing information in his knowledge in regard to the history and condition of the car. Of note is that Le did not disclose to the Plaintiff that the car had been written off as a result of a previous accident, although it had subsequently been safety inspected and

passed, making it sufficiently roadworthy to be driven on Saskatchewan roadways. Mr. Le relied on the doctrine of *caveat emptor*.

[40] Demong J. framed the issues as follows:

12 The Court is called upon to address the following issues:

1. Was the vehicle sold as is and therefore does the common law doctrine of *caveat emptor* apply?
2. Did the defendants negligently or fraudulently misrepresent the condition of the vehicle, and if so, does that entitle the plaintiff to sue for damages, and if so in what amount?
3. Was the co-defendant Mr. Le acting as a fiduciary for the plaintiff during this transaction, and if so, does that affect the manner in which he should have disclosed information about the vehicle to the plaintiff?
4. Which, if either party, is entitled to their court costs, and in what amount?

[41] In the case before me, I find that the relationship between the parties does not give rise to any fiduciary duty on the part of the Defendant, so I will not discuss this aspect further.

1. *Caveat Emptor*

[42] In para. 14, Demong J. referred at length to the case of **Wong v. Wruck**, 2008 SKPC 116, and cases cited within, which establish the principle that there is no duty of the seller to disclose vehicle defects to a potential buyer that the buyer "...could observe through ordinary inspection and inquiry". This said, if there has been active concealment on the part of the seller, in order to prevent the defect from being discovered, the doctrine of *caveat emptor* does not apply.

[43] In para. 15, Demong J. notes that the application of the principle of *caveat emptor* allows for a consideration of the relative sophistication of the parties, citing Justice Wilkinson's reference in **Frey v. Saravic** (2000), 194 Sask. R. 249 (Q.B.) to what was stated in **Rowsell v. Auto Source Inc.**, [2000] N.J. No. 33 (QL) (NFLD. Prov. Ct.) that:

...What is expected of the buyer varies a great deal depending on the circumstances, with particular emphasis being placed on the relative bargaining positions of the parties to the transaction, their experience in matters of that nature, the type of goods they are dealing in and, especially, what opportunity was available to the buyer to inspect the goods before the deal was made.

2. *Fraudulent or Negligent Misrepresentation*

[44] A fraudulent misrepresentation is a statement "...known to be false or made not caring whether it is true or false" that is "...material to the decision of the purchaser to enter the agreement and the misstatement must serve as an inducement to the making of that decision" (**Wong** at para. 21). Concealment by the seller of a known latent (not clearly observable) defect constitutes fraud. A fraudulent misrepresentation may impact upon the doctrine of *caveat emptor*.

[45] A negligent misrepresentation requires that the evidence show that:

...there was (1) a duty of care based on a special relationship between the parties; (2) a representation which is untrue, inaccurate or misleading; (3) the defendants acted negligently in making the representation; (4) he relied, in a reasonable manner, on the negligent misrepresentation and; (5) that the reliance was detrimental to him in the sense that damages resulted (**Truong** at para. 16).

[46] In para. 52, Demong J. also noted the following comments of Scott J. in **Wong**:

At para 38 she acknowledged that there are circumstances in which silence or non-disclosure is treated as a misrepresentation, thereby providing a basis for rescission of the agreement. She cited *Thomas v Blackwell*, 1999 SKQB 168 at paras 18 and 22:

[18] ... The defendants had knowledge of a problem with the east wall and of the repairs performed and did not impart that knowledge to the plaintiffs. Failure to disclose, or silence, is an act of concealment of a material fact that has the same effect as an express misrepresentation. ... That knowledge, and the failure to disclose it, is sufficient to attract liability.

...

[22] In *Frost v. Stewart*, [1998] O.J. No. 2021 (Q.L.) (Ont. Gen. Div.) it was pointed out that silence about a known major latent defect is the equivalent of an intention to deceive. As the trial judge put it, "the suppressing of a truth and the telling of a falsehood are first cousins".

53 At paras 42 - 45, Judge Scott came to the following conclusions:

[42] To reconcile the line of cases which hold there is no duty on the part of the seller to disclose and those cases which appear to hold that silence or non-disclosure of a material fact may oust *caveat emptor*, a distinction may be made. A seller has no duty to disclose patent defects but must inform the purchaser of known latent defects such as the rebuilding of an engine voiding the warranty or having been in an accident to the extent of being written off. In this Court's view, non-disclosure of a latent defect is tantamount to active concealment.

[47] In *Truong*, the Plaintiff's claim was successful in the claim for the cost of repairs, because the Court found that Mr. Le had breached his fiduciary duty to the Plaintiff.

The Court declined to find that there was fraudulent or negligent misrepresentation by Mr. Le on the basis that there was not compelling evidence of fraud, and the Plaintiff was unable to establish detrimental reliance, a necessary pre-condition to a claim for negligent misrepresentation.

[48] Of note, in the circumstances, Demong J. found that the failure of Mr. Le to disclose that the car had previously been written off, did not cause him to therefore be liable for this non-disclosure. Demong J. was not certain why it had been written off, noted that it had subsequently passed a safety inspection and was roadworthy, and speculated that this was likely a constructive write-off, related to the cost of repairs, as contrasted to an absolute total loss.

Findings of Fact

[49] I find the Plaintiff and Ms. Qureshi to have been credible witnesses who provided reliable evidence. In saying this, I appreciate that the evidence provided by the Defendant certainly challenges the Plaintiff's evidence, in particular as to what the Plaintiff should have known about the condition of the Mazda at the time of the purchase, primarily with respect to the condition of the transmission. In this regard, the Defendant relies on the Facebook Marketplace posting photograph that shows several dashboard lights illuminated, in particular, the visible AT light.

[50] The Defendant also relies on his evidence that he provided the Plaintiff with documents from Canadian Tire and Certified that showed work as having been done on the transmission.

[51] The Defendant's position is that the Plaintiff should have been aware of the possibility of a transmission problem and that the Plaintiff could have had the Mazda inspected by a mechanic prior to the purchase being completed. The Plaintiff did not choose to do this and therefore the Plaintiff purchased the Mazda essentially "as is, where is".

[52] The Facebook Marketplace posting is certainly problematic. If this photograph was in the original posting, I would expect that it would have alerted any reasonable person to the possibility of the Mazda having some mechanical issues. The Plaintiff's evidence is that this was not part of the original posting, and that it was added after the Plaintiff commenced her Claim. The Defendant states that it was, in fact, part of the original posting and submits the communication from Syed as part of his support for his position.

[53] I do not have any independent evidence as to whether it is or is not possible to modify or edit a Facebook Marketplace posting at a later date. The Plaintiff's evidence is that it is possible to do so, and submits that this is what happened. The Defendant states that it did not happen.

[54] I accept that I do not have definitive evidence before me on this point from an objective, properly qualified person. I do, however, have other evidence that bears on this issue.

[55] I am not certain what the photograph provided by the Defendant actually depicts, or when this photograph was taken. I find it odd as well that a person selling a vehicle would post a picture with dashboard lights indicating potential problems, without any explanation. This is illogical to me. Surely if a seller wants to make it clear to a person that there is a potential problem with a vehicle, and turns the vehicle on in order to display the dashboard lights, surely they would also offer an explanation, or otherwise make it very clear that the doctrine of *caveat emptor*, buyer beware, applied to the sale. Neither was done in this case. I find it quite possibly to be the case, in the absence of

evidence to the contrary, that this photograph was either added to the original listing or a new listing was created that included this photograph.

[56] With respect to the exchange between “Syed” and the Defendant, I find it interesting that the Facebook Marketplace posting is listed as “2009 Mazda mazda5”, and this conversation is in regard to 2009 Mazda **Mazda5** (bold emphasis mine). Normally responses track the title of the listing, and for some reason the small “m” on the second “mazda” is now capitalized. While I do not wish to make too much of this point, overall, I find that this evidence does not persuade me that this means the AT light was on and visible in any original photograph in the original Facebook Marketplace posting. I also note that this communication only references an engine light, which is not the same as the AT light in any event.

[57] I have evidence from the Plaintiff that the AT light came on and off at different times after she purchased the Mazda, and that it was not constantly illuminated. I do not have any evidence from an independent mechanic as to the likelihood of lights, such as the engine light, and AT light, coming on and off sporadically in the Mazda. I know from my own experience in owning and driving vehicles that there are times that a light, such as a check engine light, will illuminate sporadically.

[58] I accept the evidence of the Plaintiff that the AT light coming on was why she contacted the Defendant shortly after she had purchased the Mazda to try to ascertain why this was occurring. It accords with common sense that this contact occurred because the AT light coming on was something new. Had it been visible at the time of the purchase, I find that the Plaintiff would have queried why at that time.

[59] I find from the overall testimony of the Plaintiff that she was a careful and observant person, who would not have missed or ignored the presence of an illuminated AT light had it been present at the time of the test drive and purchase of the Mazda. I find it to be most likely the case that the AT light was not illuminated at the time that the Plaintiff and Ms. Qureshi observed the posting, test drove the Mazda, and completed the purchase.

[60] Therefore, I prefer the evidence of the Plaintiff and Ms. Qureshi that there was no AT light visible when they purchased the Mazda, as I accept their testimony that had such a light been visible, they would have noticed it, and they would have queried it. I accept that the Plaintiff was concerned about ensuring that she had a mechanically sound vehicle to drive for her children, and that she was not careless in trying to ensure that the Mazda was in such condition. I do not accept the evidence of the Defendant in this regard.

[61] I also do not accept the evidence of the Defendant that he drew the Plaintiff's attention to documents he had from Canadian Tire and Certified with respect to the Mazda. I accept the evidence of the Plaintiff that he did not do so, either orally and/or by providing her with this documentation. I note that only the inspection reports from Canadian Tire and Certified were provided at trial, which included some repairs completed by Certified that were not related to the transmission. No documents showing transmission work done by either Canadian Tire or Certified were provided in the Reply or during the trial. I have only the word of the Defendant and his wife that these documents existed, and a denial by the Plaintiff that she had ever seen or been provided these documents.

[62] The Vehicle Inspection Report from Canadian Tire provided by the Defendant dated May 29, 2022, notes that work is required on the transmission.

[63] There is nothing in this Canadian Tire report that was provided that indicates any work was done on the transmission. The Plaintiff states that she had a search conducted on the Mazda's history at Canadian Tire and that this search did not support the Defendant's claim that transmission work had been done on the Mazda. The Plaintiff had requested that the Defendant provide her documentation in support of his position that such work had been done, but states that she did not receive any from the Defendant.

[64] The invoice from Certified, dated June 28, 2022, includes a charge for a diagnosis of the "hard engagement in reverse", in the amount of \$87.50. The Defendant did, as he claims, pay the invoice in full, however I note that there is no charge in regard to any actual repairs of the transmission. Mr. Fok testified that Certified did not do any work on the Mazda's transmission, because the Defendant did not want to have Certified look into this issue any further. The Defendant's claim in the Reply that he "paid something to fix the transmission already", is not supported by the evidence and is, in fact, incorrect.

[65] It would seem to me that if these documents showing work had been done on the transmission actually existed, the Defendant should have been able to obtain copies from Canadian Tire and Certified and provide them during the trial.

[66] I find that the evidence adduced by the Defendant is not credible and reliable evidence. For example, while asserting that transmission work was performed by both

Canadian Tire and Certified, it is clear that no such work was done. All that occurred was that a problem with the transmission was identified to the Defendant. As stated, I do not accept the evidence of the Defendant that he provided either or both of the Canadian Tire documents or Certified documentation to the Plaintiff that he asserts he did. I also do not accept that further work was done by either Canadian Tire or Certified on the transmission, but rather this assertion is contradicted by reliable evidence.

[67] Therefore, I find that the Defendant did not provide the Plaintiff with any documents from Canadian Tire or Certified at the time of the sale and purchase of the Mazda, and that the documents that he insisted existed from both Canadian Tire and Certified as to transmission repair work being done, simply do not exist, because no such work was done.

[68] With respect to what the Defendant knew at the time that he sold the Mazda to the Plaintiff, I note that the Facebook Marketplace posting lists the Mazda as being in “Good Condition”. The link in the posting as to what “Good Condition” means reads as follows:

You'll see a vehicle condition on cars listed by individual sellers on Marketplace. The seller needs to include the condition of their vehicle to get comparative price information from Kelley Blue Book.

If you're selling a car or truck on Marketplace, you can use this quiz provided by Kelley Blue Book to choose the right condition for your listing.

[69] This is how Kelley Blue Book defines each condition:

- **Good.** This means the vehicle has some repairable cosmetic defects and is free of major mechanical problems.

- The vehicle may need some servicing.
- The paint and bodywork may require minor touch-ups.
- The engine compartment may have minor leaks.
- The vehicle has only minor rust, if any.
- The body may have minor scratches or dings.
- The interior has minor blemishes characteristic of normal wear.
- The wheels may have minor repairable scratches or scrapes.
- All tires match and have at least 50% of tread remaining.
- Though it may need some reconditioning, it has a clean title history and will pass a safety and smog inspection.
- Some service records are available.

[70] The Defendant testified that he put everything he knew about the Mazda into the Facebook Marketplace posting. There is however, no mention in the posting about the Mazda having a possible transmission issue, although the Defendant surely knew that it did. There is no mention of the previous inspection by Certified that indicated there was likely a transmission problem, and that he had chosen not to have this investigated further and repaired. There is also no mention that the Canadian Tire inspection had identified a transmission issue.

[71] I find that despite having this knowledge about the Mazda's likely transmission problem, the Defendant chose not to disclose this to the Plaintiff. This would not have been an inadvertent error or omission, but deliberate.

[72] I find that the Defendant was well aware that the Mazda had a transmission problem when he sold the Mazda to the Plaintiff, and that the Mazda was not, in fact, in good condition. It cannot be said that the possible or likely need for a transmission to

be repaired or replaced supports an argument that the car is in good condition. The Facebook Marketplace posting defines “Good Condition” as not having any major mechanical problems. The transmission issue clearly is a major mechanical problem. I find that the Defendant knew this problem existed, but he did not disclose this to the Plaintiff, however, and chose to rather represent the Mazda as being a good purchase with only minor problems.

[73] It would seem that if the Defendant wanted to ensure that he advised the Plaintiff of everything that he knew about the condition of the Mazda, he would have ensured that during the test drive the vehicle would have been put into reverse so that the Plaintiff could hear for herself the jerking the Defendant testified to, or at least advised her of this occurring. I appreciate that I do not know with any certainty that the Mazda was or was not put into reverse at any time during the test drive, but it would seem unlikely that it was. In saying this, I recognize that it is quite possible that it was, either during the two test drives, or within the first week that the Plaintiff had possession of the Mazda after the purchase.

[74] I also do not know whether the jerking occurred every time the Mazda was put into reverse, or whether it only sporadically occurred.

[75] All this said, in order to find the Defendant liable by not applying the doctrine of *caveat emptor*, I need to find that his actions fall within one of the categories listed in **Truong**. While I am not prepared to find that there was fraudulent misrepresentation by the Defendant, I do find that there was negligent misrepresentation. The Defendant owed a duty of care to the Plaintiff, who had expressed to him her intention to rely on

the Mazda being in good working condition with no major mechanical issues. The Defendant represented the Mazda as being in good condition without any major mechanical issue. The Defendant was, as a minimum, negligent in making this representation. I find that the Plaintiff relied on this representation to her detriment in purchasing the Mazda, and that she has suffered damages as a result.

[76] In accord with the reasoning in the *Truong* decision, and cases cited within, I find that the Defendant's silence and non-disclosure about the likely transmission problem rose to the level of a misrepresentation that, given the reliance by the Plaintiff on the Defendant's representation that the Mazda was in good condition, which was untrue, makes the Defendant liable to the Plaintiff.

[77] In the circumstances, I am going to treat the sale agreement as being rescinded by the Defendant's misrepresentation, rather than award the Defendant the costs of having the Mazda's transmission replaced.

[78] The Plaintiff is entitled to have the monies she paid to the Defendant returned to her. While the Plaintiff claims for the cost of repairs to the Mazda, I am satisfied that it is sufficient for her to be compensated by return of the monies she paid to the Defendant. This is \$2,800. She will also have her costs. She is awarded pre-judgment interest pursuant to the *Judicature Act*, RSY 2002, 128, on the \$2,800 from January 29, 2023, to the date of judgment. She is awarded post-judgment pursuant to the *Judicature Act* from the date of this judgment.

[79] The sale agreement for the Mazda is cancelled. The Mazda is to be returned to the Defendant, at his expense and as he arranges. The Mazda should not be

registered in the Plaintiff's name any longer. If there are any costs associated with the Mazda being stored since the Plaintiff parked it after she stopped driving it, the matter can be brought before me for determination as whether any further costs should be awarded, and what these costs should be.

COZENS C.J.T.C.