2011 IL App (4th) 100878-U

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NO. 4–10–0878

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

ROGER GREEN and KATHERINE GREEN, Plaintiffs, v. HELLER LINCOLN MERCURY DODGE, INC., Defendant, and HELLER LINCOLN MERCURY DODGE, INC., Third-Party Plaintiff-Appellant, v. BOB GERDES, Individually and d/b/a BOB'S AUTO SALES, INC., Third-Party Defendant-Appellee, and LOREN GILLETTE and D.L. PETERSON TRUST, c/o DUPONT PHARMACEUTICALS, Respondents in Discovery.	)	Appeal from Circuit Court of Livingston County No. 05L12 Honorable Jennifer H. Bauknecht, Judge Presiding.

JUSTICE COOK delivered the judgment of the court.
Justices Turner and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the trial court's grant of summary judgment to third-party defendant where third-party plaintiff sought contribution after being found liable for breach of an implied warranty of merchantability and a violation of the Consumer Fraud Act, because contribution is not allowed in contract actions or for intentional torts and third-party plaintiff does not fall within the exceptions that allow for the application of implied indemnity.

¶ 2 I. BACKGROUND

¶ 3 In 1999, Bob Gerdes purchased a 1999 Ford Crown Victoria with substantial

damage stemming from an accident. Gerdes welded together the front portion of the Crown Victoria with the back portion of a police cruiser. The front and back portions of the vehicle possessed different vehicle identification numbers. The resulting vehicle is commonly referred to as a clipped vehicle. Gerdes did not obtain a rebuilt title for the vehicle.

¶ 4 On June 1, 1999, Gerdes, doing business as Bob's Auto Sales, sold the vehicle to Loren Gillette. Gillette paid approximately $1,000 for the vehicle, because Gillette was credited with $17,000 for a trade-in.

¶ 5 On June 4, 2001, Gillette traded in the vehicle to Heller Lincoln Mercury Dodge, Inc., for an allowance towards the purchase of a 2001 Dodge Dakota. At the time of purchase, Heller argues it was unaware the vehicle was clipped.

¶ 6 Almost a year later, on May 17, 2002, Heller sold the vehicle to Roger and Katherine Green for $12,962. Timothy Barlow, a salesman for Heller, assisted the Greens in the purchase of the vehicle. Barlow assured the Greens the vehicle had been inspected. The Greens traded in their 1993 Ford Tempo to Heller and used the trade-in allowance as a down payment on the vehicle. Heller claims that at the time of the sale of the vehicle to the Greens, Heller was still unaware of the vehicle being clipped.

¶ 7 In January 2004, the vehicle's transmission was repaired by Heller. Later that same year, during the month of August, the vehicle was involved in an accident. The Greens took the vehicle to Collision Revision, a body shop, for repairs. Collision Revision informed the Greens that the vehicle was clipped. The Greens did not know the vehicle was clipped until they were notified by Collision Revision.

¶ 8 On April 18, 2005, the Greens filed a complaint against Heller alleging Heller

violated the Consumer Fraud and Deceptive Business Practices Act, breached the implied warranty of merchantability, and committed common-law fraud. The Greens also requested punitive damages. On August 22, 2005, the Greens filed a motion for partial summary judgment, pursuant to section 2–1005 of the Code of Civil Procedure (Code) (735 ILCS 5/2–1005 (West 2008)), concerning Heller's violation of the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 through 12 (West 2008)) and breach of the implied warranty of merchantability. On June 6, 2006, the trial court granted the Green's motion for partial summary judgment. The court found that Barlow, Heller's employee, "represented the vehicle in question to be a 'good car' and that his description was sufficient to create potential merchantability and consumer fraud liability."

¶ 9 On April 23, 2007, Heller filed a third-party complaint against Gerdes, individually and doing business as Bob's Auto Sales, for contribution or indemnification for any damages Heller may have to pay to the Greens.

¶ 10 After undergoing mediation to resolve the underlying dispute, the Greens and Heller entered into a settlement agreement on May 10, 2007. The settlement agreement contained a release. Under the terms of the release, in satisfaction of the partial summary judgment granted in favor of the Greens, Heller agreed to pay two separate sums to and on behalf of the Greens, $7,189 and $12,432.23. Heller also agreed to pay an additional $93,000 to the Greens in exchange for the discharge of Heller and other specified persons and entities, including Gerdes as an individual and doing business as Bob's Auto Sales, from the following:

> "any and all claims, actions, causes of action, demands, rights, damages, costs, expenses and compensation of whatsoever

kind or nature *** on account of any and all known and unknown, foreseen and unforeseen damages, property damage[,] or the consequences thereof *** resulting or to result from incidents which occurred on or after May 17, 2002 and continuing thereafter."

¶ 11 On September 8, 2009, Gerdes filed a motion for partial summary judgment on the issue of damages under the Joint Tortfeasor Contribution Act (740 ILCS 100/0.01 through 5 (West 2008)). After arguments were presented by counsel for both parties, the trial court took the matter under advisement. On December 29, 2009, the court entered an order granting Gerdes' motion for partial summary judgment. The court found that the parties were not joint tortfeasors under the Joint Tortfeasor Contribution Act, because (1) there is no relationship between Gerdes and the Greens, (2) Gerdes did not "owe any discernable duty to [the] Green[s] upon which a tort claim could rest," and (3) the liability between the parties is based in contract.

¶ 12 On April 29, 2010, Gerdes filed a motion for summary judgment, pursuant to section 2–1005 of the Code (735 ILCS 5/2–1005 (West 2008)), concerning whether Heller may recover from Gerdes under a theory of implied indemnity or contribution for damages Heller paid to the Greens. Relying on *Allison v. Shell Oil Co.*, 113 Ill. 2d 26, 495 N.E.2d 496 (1986) (*Allison II*), the trial court found that "implied indemnification based upon an active passive distinction is no longer a valid doctrine for shifting costs associated with tortious conduct." The court rejected Heller's implied-indemnity argument that characterized Gerdes as the manufacturer or creator of the clipped vehicle. The court granted Gerdes' motion for summary judgment and dismissed the third-party complaint against Gerdes.

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 In this appeal, the appellee has failed to file a brief. A reviewing court is not compelled to serve as an advocate for the appellee and is not required to search the record for the purpose of sustaining the trial court's judgment. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133, 345 N.E.2d 493, 495 (1976).

¶ 16 On appeal, Heller argues the trial court erred in granting partial summary judgment to Gerdes on the issue of damages under the Joint Tortfeasor Contribution Act (740 ILCS 100/0.01 through 5 (West 2008)) for the following reasons: (1) Gerdes and Heller are subject to liability in tort to the Greens arising from the same injury and (2) the court did not determine the basis of Heller's violation of the Consumer Fraud Act. Heller also claims the court erred in granting summary judgment to Gerdes on the issue of Heller's right to indemnity under the theory of implied indemnity, because causes of action for implied indemnity are still allowed even after the adoption of the Joint Tortfeasor Contribution Act.

¶ 17 Section 2 of the Joint Tortfeasor Contribution Act provides for a right of contribution as follows:

> "§2. Right of Contribution. (a) Except as otherwise provided in this Act, where 2 or more persons are subject to liability in tort arising out of the same injury to person or property, or the same wrongful death, there is a right of contribution among them, even though judgment has not been entered against any or all of them." 740 ILCS 100/2(a)

(West 2008).

¶ 18 Contribution under the Joint Tortfeasor Contribution Act requires that the parties be "subject to liability in tort." The breach-of-implied-warranty-of-merchantability count is not a tort count, but Heller argues that the theory under which the Greens recovered is not dispositive, that if tort liability potentially existed, contribution might be appropriate, citing *Giordano v. Morgan*, 197 Ill. App. 3d 543, 554, 544 N.E.2d 810, 813 (1990). In *Giordano*, however, the court refused contribution because the acts of the defendants caused two separate injuries: the insurance defendants failed to procure the requested coverage, and the other driver defendant caused the accident. *Giordano*, 197 Ill. App. 3d at 552, 554 N.E.2d at 816. The trial court in the present case considered whether there was any liability outside of contract and concluded there was not: "Here, there was no relationship between Green and Gerdes, nor did Gerdes owe any discernable duty to Green upon which a tort claim could rest. Liability from one party to the other clearly sounds in contract, not in tort." We agree with the trial court. Heller's liability to the Greens exists independent of any acts of Gerdes.

¶ 19 "[I]ntentional tortfeasors are not entitled to contribution under the Illinois Contribution Among Joint Tortfeasors Act." *Gerill Corp. v. Jack L. Hargrove Builders, Inc.*, 128 Ill. 2d 179, 206, 538 N.E.2d 530, 542 (1989). Heller argues that a violation of the Consumer Fraud Act may be based on an innocent or negligent misrepresentation as well as one that is intentional, and the basis must be determined before a party's right to contribution for his liability under the Consumer Fraud Act can be decided, citing *Carl Sandburg Village Condominium Ass'n No. 1 v. First Condominium Development Co.*, 197 Ill. App. 3d 948, 953, 557 N.E.2d 246, 250 (1990). Heller, however, did not request that the trial court explain the

basis for its finding that Heller was liable under the Consumer Fraud Act.

¶ 20 In its June 6, 2006, order, the trial court entered summary judgment for plaintiffs Green, finding that liability had been established under the breach-of-implied-warranty-of-merchantability count and under the Consumer Fraud Act count. The court further stated that "the issue of damages is reserved; the court finds that the plaintiff, under the showing so far, is not entitled to punitive damages." On May 10, 2007, the Greens executed a release of all claims, recognizing that Heller had paid the Greens $7,189 and $12,432.23, and stating that, in consideration of the additional payment of $93,000, the Greens released all parties from any and all claims, "including, but not limited to, claims for actual damages, costs, attorney's fees, interest, treble damages, punitive damages, exemplary damages, loss of use, and any and all other types and kinds of damages." The trial court did not reach the issue of punitive damages, but the parties clearly included punitive damages in the release of all claims, for which Heller seeks contribution from Gerdes.

¶ 21 Courts should award punitive damages in Consumer Fraud Act cases only for conduct that is outrageous, either because the defendant's motive was evil or the acts showed a reckless disregard of others' rights. *Kirkpatrick v. Strosberg*, 385 Ill. App. 3d 119, 132, 894 N.E.2d 781, 794 (2008). "The Consumer Fraud Act explicitly allows for the recovery of punitive damages where the conduct of the defendant was willful or intentional and done with evil motive or reckless indifference to the rights of others." *Linhart v. Bridgeview Creek Development, Inc.*, 391 Ill. App. 3d 630, 641, 909 N.E.2d 865, 875 (2009). There is no evidence in this case, or even persuasive argument, that Heller's conduct which resulted in Consumer Fraud Act liability, was based on an innocent or negligent misrepresentation. The bulk of Heller's payment pursuant

to the release of all claims clearly was for punitive damages, for which Heller could not seek contribution.

¶ 22 Last, Heller claims that if it is unable to recover damages under the Joint Tortfeasor Contribution Act, then it is entitled to indemnity from Gerdes under a theory of implied indemnity. Relying on *Allison v. Shell Oil Co.*, 133 Ill. App. 3d 607, 479 N.E.2d 333 (1985) (*Allison I*), Heller asserts that even after the adoption of the Joint Tortfeasor Contribution Act, the theory of implied indemnity remains viable for certain causes of action, including cases involving pre-tort relationships that give rise to a duty to indemnify and strict liability. In *Allison I*, the court found that implied indemnity remains a viable cause of action where the following pre-tort relationships exist: "(1) master and servant; (2) employer and employee; (3) lessor and lessee; and (4) owner and his lessee." *Allison I*, 133 Ill. App. 3d at 610, 479 N.E.2d at 336. The court also recognized implied indemnity in causes of action involving strict liability. *Id* at 611, 479 N.E.2d at 336. Heller argues the parties have a relationship, car manufacturer and car dealer, similar to the pre-tort relationships recognized in *Allison I*. Heller characterizes Gerdes as a car manufacturer who placed a defective product, the clipped vehicle, into the stream of commerce.

¶ 23 Implied indemnity developed as a means to avoid the harsh result of the common-law rules prohibiting contribution and stems from two distinct theories, one based on tort principles and one based on quasi-contract principles. *American National Bank & Trust Co. v. Columbus-Cuneo-Cabrini Medical Center*, 154 Ill. 2d 347, 350, 609 N.E.2d 285, 287 (1992). Active-passive negligence allowed a less culpable, or passively negligent, tortfeasor to shift the entire burden of the plaintiff's loss to a more culpable, or actively negligent, tortfeasor. *Allison II*, 113 Ill. 2d at 34, 495 N.E.2d at 501. However, recovery based on a theory of active-passive

negligence was extinguished by the adoption of contribution among joint tortfeasors in *Skinner v. Reed-Prentice Division Package Machinery Co.*, 70 Ill. 2d 1, 374 N.E.2d 437 (1977), which was codified in the Joint Contributer Contribution Act. *Kerschner v. Weiss & Co.*, 282 Ill. App. 3d 497, 503, 667 N.E.2d 1351, 1355 (1996).

¶ 24 In this case, the exceptions set forth in *Allison I* that allow for the application of implied indemnity do not apply. The relationship between Heller and Gerdes does not fall within nor is it akin to the types of pre-tort relationships recognized in *Allison I* (master and servant, employer and employee, lessor and lessee, and owner and lessee). The parties do not have a direct relationship similar to the pre-tort relationships set forth in *Allison I*. We also do not agree with Heller's characterization of the parties' relationship as one between a car manufacturer, Gerdes, and a car dealer, Heller. The welding together of two vehicle halves does not make Gerdes a car manufacturer. Gerdes' creation of the clipped vehicle is not similar to the car-manufacturing process engaged in by companies like General Motors. Further, this case does not involve a strict liability cause of action. We are not persuaded by Heller's argument characterizing Gerdes as a car manufacturer who placed into the stream of commerce a dangerous vehicle. As we have previously discussed, Gerdes is not a manufacturer.

¶ 25 Heller's brief fails to demonstrate *prima facie* reversible error concerning Heller's claims for indemnity from Gerdes.

¶ 26 III. CONCLUSION

¶ 27 For the foregoing reasons, we affirm the trial court's award of summary judgment.

¶ 28 Affirmed.