

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 10, 2007**

David R. Schanker  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2006AP676**

**Cir. Ct. No. 2003CV1220**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**MARK A. WEST,**

**PLAINTIFF-APPELLANT,**

**V.**

**BLUE DIAMOND AUTO SALES, INC.,**

**DEFENDANT-RESPONDENT,**

**AUTO-OWNERS INSURANCE COMPANY,**

**DEFENDANT.**

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APPEAL from a judgment and an order the circuit court for Outagamie County: DENNIS C. LUEBKE, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Mark West appeals a jury verdict finding Blue Diamond Auto Sales, Inc. did not breach any warranties or contractual obligations made during the sale of a used Cadillac. West argues there was no credible evidence to support the jury's finding. Alternatively, West argues he is entitled to a new trial because the jury's findings were perverse and the jury was not properly instructed. We disagree and affirm the judgment.

#### BACKGROUND

¶2 In August 2002, West acquired a used Cadillac from Blue Diamond in exchange for \$12,800, plus an extended warranty and various taxes for a total purchase price of \$15,125.90. When Blue Diamond sold the vehicle and West took possession, Blue Diamond did not own it. Instead, Lexus North Shore owned the vehicle, which had disappeared from North Shore's lot sometime after April 16, 2002. Blue Diamond subsequently obtained the vehicle from a wholesaler. North Shore did not report the vehicle stolen until January 9, 2003, when it discovered the vehicle was missing through a year-end inventory check.

¶3 After the transaction, Blue Diamond had trouble locating the vehicle's title. Blue Diamond contacted the original owner to obtain signed documentation needed to obtain a replacement title for West. Six and one-half months after the purchase, West received title to the vehicle. By retitling the vehicle, the police investigating North Shore's stolen vehicle report discovered the vehicle's location. On March 4, 2003, the police contacted West, informing him that the vehicle was reported stolen. The police directed him not to drive the vehicle until they determined his role in the alleged theft. Consequently, West was prevented from using the vehicle for two days.

¶4 After the police contacted West, he called Rory Burton, the owner of Blue Diamond, and pleaded with him to do what was necessary for West to keep the vehicle. West also told the police that he did not want his vehicle impounded because he claimed to have good title. West then contacted Blue Diamond about taking the vehicle back and refunding his money. Blue Diamond refused to refund West's money because during his ownership of the vehicle, West drove it thousands of miles, and had installed roughly \$20,000 in accessories, altering the vehicle from its factory condition to a customized one. West demanded the return of the purchase price and the value of the added accessories. West filed a complaint with the Department of Transportation. The DOT investigated and determined his complaint was not justifiable because West now had title and had placed a significant amount of miles on the vehicle. West then sued Blue Diamond.

¶5 On April 19, 2005, the jury returned a verdict in favor of Blue Diamond, finding West failed to prove any of his five causes of action. Specifically, the jury answered the nine questions presented to it, as follows:

Question 1: Did the defendant give buyer a warranty with respect to the title and/or condition of the subject vehicle?  
Answered: Yes.

Question 2: If you answered "yes," to Question 1, then answer this question: Did the defendant breach any warranties given to the buyer? Answered: No.

Question 3: Did the defendant breach of warranties given to buyer cause the buyer to sustain losses? Answered: No.

Question 4: Did the defendant fail to substantially perform any of its obligations under the purchase contract in that the vehicle contained nonconformities which substantially impaired the value of the automobile to the plaintiff?  
Answered: No.

Question 5: Was the plaintiff's acceptance of the automobile reasonably induced either by the difficulty of discovery of the nonconformities before acceptance or by the defendant's assurances? Answered: Yes.

Question 6: Did the buyer attempt to revoke his acceptance of the automobile within a reasonable time after he discovered or should have discovered the grounds for revocation? Answered: No.

Question 7: Should the buyer be entitled to revoke the purchase of the subject vehicle? Answered: No.

Question 8: Did the defendant, while attempting to sell the automobile to the plaintiff, make or publish an advertisement, announcement, statement or representation to the plaintiff relating to the purchase or sale, of the automobile or to the terms or conditions thereof, which advertisement, announcement, statement or representation contained any assertion, representation or statement of fact which was untrue, deceptive or misleading?  
Answered: No.

Question 9: The jury did not answer question nine, relating to the amount of damages, as instructed because it did not answer yes to questions three, four, or seven.

¶6 West filed motions after the verdict, requesting the court reverse the jury's answers and to enter judgment in favor of the plaintiff, or grant a new trial. The court granted West's request as to question eight. However, the court denied West's motion as to the other jury findings and his motion for a new trial.

#### DISCUSSION

¶7 We will not upset a jury verdict if there is any credible evidence to support it. *Delaney v. Prudential Ins. Co.*, 29 Wis. 2d 345, 349, 139 N.W.2d 48 (1966). Additionally, we view the evidence in the light most favorable to the verdict. *Id.*

¶8 West argues the jury's findings as to questions two, three, four, six and seven should be reversed because there was no credible evidence upon which

the jury could have based its findings.<sup>1</sup> We disagree. We conclude there is credible evidence to support the jury's verdicts on questions two and four. Therefore, we need not consider whether there is credible evidence to support questions three, six, and seven.

¶9 As a preliminary matter, West claims all essential facts of his claims were either established by undisputed testimony or freely admitted at trial. However, our role is not to review the evidence in favor of West, but to search the record for any credible evidence that supports the jury's findings. *See id.* Additionally, West did not object to the jury instructions, which he now claims on appeal were erroneous. Therefore, he has waived any objection as to how the jury was instructed on the law. *See* WIS. STAT. § 805.13(3);<sup>2</sup> *see also Roach v. Keane*, 73 Wis. 2d 524, 535-36, 243 N.W.2d 508 (1976).

¶10 Turning to verdict question two, we conclude there is credible evidence to support the jury's finding that Blue Diamond did not breach any warranties given to West. West argues Blue Diamond breached its warranty of good title. He apparently bases his argument on the presumption that Blue

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<sup>1</sup> West also argues question eight was incorrectly decided by the jury. However, the circuit court granted West's motion to change the jury verdict on that question. Therefore, we will not address his contention because the circuit court already granted West the relief he now requests from this court.

<sup>2</sup> All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Diamond could not provide good title to him because the vehicle was stolen.<sup>3</sup> West relies on *Mulvaney v. Tri State Truck & Auto Body, Inc.*, 70 Wis. 2d 760, 235 N.W.2d 460 (1975), for the proposition that before a vehicle can be transferred, good title must be provided to the purchaser at the time of the delivery of the vehicle. *Mulvaney* however also recognizes, as do the statutes, that “a transfer of interest can precede the transmittal of the certificate with its warranty.” *Id.* at 765; *see also* WIS. STAT. § 342.15(3).<sup>4</sup> The record establishes that West received good title to the vehicle, albeit several months after he took possession of it. Therefore, we conclude there was credible evidence upon which the jury could find Blue Diamond did not breach any warranty of good title provided to West.

¶11 Turning to question four, we conclude there is credible evidence that Blue Diamond did not breach its contractual obligations. The jury was asked whether Blue Diamond failed to substantially perform any of its obligations under the purchase contract which substantially impaired the value of the vehicle to West. West argues Blue Diamond’s inability to provide any title constitutes a breach of the contract. As noted above, Blue Diamond provided good title. Therefore, the only question is whether the delay in providing title to the vehicle

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<sup>3</sup> West argued both before the circuit court and on appeal that the vehicle was undisputedly stolen based on the fact that North Shore reported the vehicle stolen. However, the jury was not instructed that the vehicle was stolen as a matter of law. West did not object to the jury instructions and therefore he is held to have waived any objections. *See* WIS. STAT. § 805.13(3). Based on the evidence presented, the jury was free to draw its own conclusions about the vehicle’s history. Rory Burton repeatedly asserted that the vehicle was not stolen. Additionally, West never gave up possession of the vehicle, and title was cleared shortly after the confusion, at no expense to West.

<sup>4</sup> West argues Blue Diamond’s failure to provide title at the time of the sale constitutes a breach of warranty of good title. However, West does not cite any authority to support his proposition that Blue Diamond’s failure to comply with the procedure for providing title establishes that Blue Diamond breached the warranty of good title, when good title is eventually provided.

substantially impaired the value of the vehicle. The jury had evidence that West purchased the vehicle for \$12,800 and drove it at least 77,000 miles in two and half years. Additionally, even according to his own testimony, West was only restricted from driving the vehicle because of the title problem for two days out of over two and one-half years of ownership. Furthermore, West added about \$20,000 worth of accessories to the vehicle, which altered the vehicle from its factory condition to a highly customized one. Therefore, the jury had credible evidence upon which to base its finding that Blue Diamond's delay did not substantially impair the value of the vehicle.

¶12 West also argues the jury's findings with respect to questions four and five are inconsistent and on this basis alone should be set aside. He contends that it was inconsistent for the jury to conclude that West's acceptance was induced by the difficulty of discovering nonconformities, which in this case was Blue Diamond not having good title, but then conclude Blue Diamond did not breach any of its contractual obligations. We are not persuaded. The jury could have reasonably concluded the failure to pass immediate title was not a substantial breach. Under this scenario, the jury's findings regarding questions four and five are consistent.

¶13 Finally, West argues the jury's decision was perverse. A jury verdict is perverse when it is "clearly contrary to the evidence." *Fouse v. Persons*, 80 Wis. 2d 390, 396, 259 N.W.2d 92 (1977). Despite West's characterization of the record, as noted above, there was credible evidence to support the jury's findings. Therefore, we conclude the jury's decision was not perverse. *See id.*

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE  
809.23(b)5.

